COURTS

A COMPARATIVE AND POLITICAL ANALYSIS

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1 THE PROTOTYPE OF COURTS

Students of courts have generally employed an ideal type, or really a prototype, of courts involving (1) an independent judge applying (2) preexisting legal norms after (3) adversary proceedings in order to achieve (4) a dichotomous decision in which one of the parties was assigned the legal right and the other found wrong. The growth of political jurisprudence[1] has been characterized largely by the discovery and emphasis of deviations from the prototype found in the behavior of particular courts, showing how uncourtlike courts are or how much they are like other political actors. While some political scientists and many lawyers have continued to protest against this approach, they have done so largely by reasserting the prototype.[2] Such a tactic is unconvincing because, if we examine what we generally call courts across the full range of contemporary and historical societies, the prototype fits almost none of them. Defense of the prototype thus seems fruitless. A study of courts that is essentially the measurement of deviance from a type that is rarely approximated in the real world would appear to be equally fruitless.

The Logic of the Triad in Conflict Resolution

Perhaps it would be wise to begin over, employing a root concept of "courtness" but more freely accepting the vast variety of actual social institutions and behaviors loosely related to that concept without worrying about where "true courtness" ends and something else begins. For in reality there are few if any societies in which courts are so clearly delineated as to create absolute boundaries between them and other aspects of the political system.

The root concept employed here is a simple one of conflict structured in triads.[3] Cutting quite across cultural lines, it appears that whenever two persons come into a conflict that they cannot themselves solve, one solution appealing to common sense is to call upon a third for assistance in achieving a resolution. So universal across both time and space is this simple social invention of triads that we can discover almost no society that fails to employ it. And from its overwhelming appeal to common sense stems the basic political legitimacy of courts everywhere. In short, the triad for purposes of conflict resolution is the basic social logic of courts, a logic so compelling that courts have become a universal political phenomenon.

The triad, however, involves a basic instability, paradox, or dialectic that accounts for a large proportion of the scholarly quarrels over the nature of courts and the political difficulties that courts encounter in the real world. At the moment the two disputants find their third, the social logic of the court device is preeminent. A moment later, when the third decides in favor of one of the two disputants, a shift occurs from the triad to a structure that is perceived by the loser as two against one. To the loser there is no social logic in two against one. There is only the brute fact of being outnumbered. A substantial portion of the total behavior of courts in all societies can be analyzed in terms of attempts to prevent the triad from breaking down into two against one.[4]

CONSENT

The most fundamental device for maintaining the triad is consent. Early Roman law procedures provide a convenient example.[5] The two parties at issue first met to decide under what norm their dispute would be settled. Unless they could agree on a norm, the dispute could not go forward in juridical channels. Having agreed on the norm, they next had to agree on a judge, a third person who would find the facts and apply the previously agreed upon norm to settle their dispute. The eventual loser was placed in the position of having chosen both the law and the judge and thus of having consented to the judgment rather than having had it imposed on him.

The almost universal reluctance of courts to proceed in the absence of one of the two parties is less a testimony to the appeal of adversary processes than it is a remnant of this emphasis on consent, of both parties themselves choosing the triad as the appropriate device for conflict resolution. In early stages of English law, courts were frequently thwarted by the absence of one of the parties, and medieval procedure is full of elaborate devices for enticing or compelling the unwilling party into court rather than proceeding without him.[6] Modern British and American practice still prefers extended delay to the absence of one of the parties, and in many tribal societies the anthropologist encounters the same reluctance to proceed without all three members of the triad and comparable devices to cajole or coerce attendance.[7]

All of this can, of course, be put in the form of the classic political question: Why should I obey? The loser is told that he should obey the third man because he has consented in advance to obey. He has chosen the norm of decision. He has chosen the decider. He has thus chosen to obey the decision.

THE MEDIATING CONTINUUM

Nearly every triadic conflict resolver adds another device to consent in order to avoid the breakdown into two against one. This device is the

avoidance of the dichotomous, imposed solution. In examining triadic conflict resolution as a universal phenomenon, we discover that the judge of European or Anglo-American courts, determining that the legal right lies with one and against the other of the parties, is not an appropriate central type against which deviance can be conveniently measured. Instead he lies at one end of a continuum. The continuum runs: go-between, mediator, arbitrator, judge. And placement on the continuum is determined by the intersection of the devices of consent and nondichotomous, or mediate, solution.

The go-between is encountered in many forms. In tribal or village societies he may be any person, fortuitously present and not connected with either of the households, villages, or clans in a dispute, who shuttles back and forth between them as a vehicle of negotiation.[8] He provides communication without the dangerous physical contact between the disputants that would otherwise be required. In more modern guise we find him as the sovereign offering "good offices" in an international dispute or the real estate broker shuttling between seller and prospective buyer and carefully keeping them apart at the negotiation stage. The go-between seems to operate in a pure consent, pure mediate-solution situation. He cannot function at all unless both parties consent to his offices and the solution reached is the product of free negotiation between the parties and is mutually satisfactory. And in theory, all resolutions offered and accepted are purely those of the parties themselves.

In reality, however, the go-between is not a mindless communicator. He exerts influence by "rephrasing" the messages he delivers. He may manage to slip in a fair number of proposals of his own. And by his characterization of the flexibility or inflexibility of each side to the other, he may strengthen or weaken the bargaining position of one or the other.

The mediator is somewhat more open in his participation in the triad. He can operate only with the consent of both parties. He may not impose solutions. But he is employed both as a buffer between the parties and as an inventor of mediate solutions. By dealing with successive proposals and counterproposals, he may actively and openly assist in constructing a solution meeting the interests of both parties.[9]

The distinction between mediation and arbitration in any particular society is a matter of legal nuance and often the subject of bitter controversy, particularly in such areas as labor arbitration. Often too the distinction is made between voluntary and binding arbitration. For our purposes we may treat arbitration generically and speak of it as involving less consent by the parties and less mediate solutions than mediation. Persons are not normally compelled to consent to arbitration. In this sense the arbitrator, like the mediator and the go-between, cannot function without the consent of both parties. In modern societies, however, arbitration clauses frequently appear in contracts so that the consent is somewhat at-

tenuated. It is not consent of the moment to the arbitration of the moment but advance consent to future arbitration in general. Yet even such contracts almost invariably specify that the two parties must in each instance agree on who the arbitrator shall be.

The key distinction between the mediator and arbitrator, however, is that the arbitrator is expected to fashion his own resolution to the conflict rather than simply assisting the parties in shaping one of their own. And his solutions are not purely mediated in a number of senses. First, arbitrators, unlike mediators and go-betweens, usually work with a relatively fixed set of legal norms, analogous to that of the early Roman judge. The parties have consented to, or themselves constructed in advance, the norms to which they will now be subject. If in a given dispute one party has violated these norms more than the other, it is not expected that the arbitrator arrive at a compromise solution purely on the basis of the interests of the parties and quite apart from their obedience to the preexisting norms. Moreover, arbitration is frequently "binding" either by statute or under the terms of the contract. The arbitrator has the legal authority to impose his solution on both parties even if one or both do not voluntarily consent to the solution."[10]

Nevertheless, societies tend to turn to arbitration in situations in which, although overarching legal norms may exist, the most salient concerns are the interests of the two parties, neither of which is assigned greater legitimacy than the other. Mediate solutions acceptable to both parties are the goal, and, as a practical matter, few arbitrators would find much employment if they did not develop a record of providing such solutions.[11] Of course this is all the more true in "nonbinding" arbitration, in which the parties need not accept the arbitrator's resolution. In American labor law, for instance, a distinction is often made between "rights" arbitration and "interest" arbitration. In most labor-management contracts there are some provisions that set out with a relatively high degree of specificity the rights and duties of the two parties in relation to one another. When a dispute under one of these provisions is submitted to arbitration, both parties expect the arbitrator to decide who was legally right rather than provide a mediate solution. The same union and company may submit other kinds of disputes not covered by such precise contract terms to the same arbitrator and expect mediate solutions.

When arbitration is in no sense binding, it merges with mediation.When arbitration is binding, both in the sense that the two parties must go to arbitration on the demand of either and must then abide by the arbitrator's holdings, it tends to merge into judicial judgment. This is particularly true in instances such as "rights arbitration," when the arbitrator is expected to reach a legally correct rather than a mediate solution even though the "law" is that created by a mutually agreed contract between the

parties. When arbitration is binding and dichotomous solutions are expected, then the "arbitrator" in fact becomes a kind of private judge, that is one who judges rather than mediates but does not hold the governmental office of judge. The very fact that he does not hold such an office but is chosen by the parties, rather than imposed on them, preserves a greater element of consent that continues to distinguish him from the official judge.

Recently one of the favored tactics for relieving delay in the civil courts has been the adoption of systems of compulsory arbitration in which suits involving relatively small amounts of money are assigned to "arbitrators" rather than tried before a judge. Such a system is not really one of arbitration but one of cheap judging. The arbitrator is expected to arrive at the same decision under the same law as would a judge. The parties usually do not choose the arbitrator. He uses simpler procedures and carries a lower overhead of courtroom costs than a judge and thus handles more cases at smaller cost. Such systems thus allow the appointment of a great many temporary judges by avoiding constitutional, statutory, and budgetary limitations on formal judicial appointments.[12]

THE SUBSTITUTION OF LAW AND OFFICE FOR CONSENT

In turning now to judges, we return to the problem of consent and to our Roman example. As societies become more complex, they tend to substitute law for the particular consent of the parties to a particular norm for their particular dispute. They also substitute office for their free choice of a particular third man to aid in the resolution of their dispute. The earliest Romans might seek the aid of anyone in formulating a norm. They came more and more to turn to city officials for this assistance. The Praetorian Edict, which was the closest thing to a civil code that Rome as a city attained, long took the form of a series of norms that such an official announced he would supply to contending parties at their request. It was initially not a body of preexisting law but a catalogue of "ready-made" goods that replaced the still earlier practice of "tailoring" norms for each pair of disputants. As the practice grew under which each of the new praetors reenacted the edict of his predecessors, we can literally see what begins as a system of free legal advice to mutually consenting parties becoming a set of preexisting compulsory legal rules. A parallel development can be seen in the writings of the jurisconsults, which begin as professional legal advice to the praetors and litigants and end as operative parts of the Code of Justinian.[13]

The key factor in the shift from consent to law is specificity. Ethnographic and sociological materials make clear that in only a very limited number of special situations do litigants literally make their own rule of decision free of all preexisting norms.[14] At the very minimum there is a

social sense of appropriateness or natural justice, of how we always do things or what we never do, of the sort suggested by the Tiv informant who says of what we would call a lawbreaker that he "spoils the tjar."[15] We may express this consensus in terms of custom or fundamental principles of ordered liberty or, as the Tiv does, as a psychic harmony of men and nature. It creates the constraints under which prospective litigants shape a norm for themselves. Indeed, much of judicial ritual, particularly in the holding of public trials, consists of reminding the litigants that as good men they must consent to the overarching norms of their society. Yet the more nebulous these norms, the greater the element of immediate and real consent in achieving a precise working rule for a particular case. At one extreme we find two disputing villagers working with an elder to settle the ownership of a pig according to the ways of the ancestors. If any rule of decision is actually formulated, it is likely to arise out of the adeptness of the elder in eliciting the face-to-face consent of the parties. At the other extreme we find litigants in a modern industrial state who discover at trial that their earlier behavior was governed by a detailed preexisting rule, even the existence of which was unknown to them at the time and which they consent to only in the generalized, abstract sense that all citizens agree to live under the laws of the state. The judge, then, unlike the mediator, imposes "his" rule on the parties rather than eliciting a consensual one.

Moreover, the parties may not specifically consent even to who shall impose his rule or decide under it. The most purely consensual situation is one in which the disputants choose who shall assist them in formulating a rule and who shall decide the case under it, as the Romans initially did. In most societies, however, there seem to be instances in which it pays to choose a big man to do these tasks, whether a government official like the urban praetor or, as among the Papuans, the owner of many pigs.[16] The disputants may turn to the big man because he knows more of the law and custom, because he has the economic, political, or social power to enforce his judgment, or because his success or high position is taken as a symptom of his skill and intelligence at resolving disputes. Beyond and perhaps out of this tendency to consent to judging by big men, many societies develop the office of judge so that the parties do not choose their judge. If they choose to go to court at all, they must accept the official judge. The ultimate step, of course, is in those instances in which a legal system not only imposes the law and the officer of the law but also compels one or both parties to resort to legal processes, as in a criminal trial or civil suit. The judge, then, unlike the mediator, imposes himself on the parties rather than being chosen by them.

He also may impose his resolution of their conflict. It is possible to envision a system in which the parties were compelled to accept the rule

of decision and the person of the judge but were not compelled to accept his decision. Compulsory nonbinding arbitration sometimes comes down to this. That is, the parties may be compelled by statute or a contract provision to go to arbitration if a contract provision is in dispute, but the same statute and/or contract may not compel them to accept the arbitrator's award. Under the divorce procedures of many jurisdictions, ranging from some of the American states to many Communist countries, those seeking a divorce must first submit to "marriage counseling" by persons either licensed or employed by the government. They need not accept the "advice" of the counselor they are compelled to see. But they may only proceed with the divorce after they have heard the advice and rejected it. In some societies the losing party to one litigation might refuse the decision and resort to another forum or accept banishment. Appeal and pardon processes sometimes exhibit this feature, as for instance in "de novo" appeals, in which the dissatisfied party may get an entirely new trial from a higher court.

Nevertheless, in general, judges may impose a final resolution independent of the consent of the parties. Even when the third man must gain the consent of the parties to his resolution, as for instance the mediator must, it is possible for him to propose a dichotomous solution—one in which party A wins all and B loses all. But for obvious reasons he is unlikely to do so. When the specific consent of the parties is not required, such resolutions are more feasible. The go-between has little or no enforcement power. The mediator may do somewhat better by bringing to bear general social sentiment in favor of resolution. We often distinguish the arbitrator from the mediator on the basis that the arbitrator's decisions are subsequently enforceable by court action. Judges are furthest along the spectrum toward complete enforcement, typically having means to tap the organized forces of coercion in the society to enforce their solution. Moreover, where the judge is administering a detailed body of law whose building blocks are concepts of legal right and obligation, such resolutions are at least partially dictated by the rules of decision he has imposed on the parties.

Curiously enough it is precisely the need to elicit the consent of the loser to a decisional process that has been largely imposed on him that may lead to a decision stripping him of everything. To the extent that he believes that a third person whom he has not chosen is exercising discretion in behalf of his opponent, he may deny the legitimacy of the whole judicial system. Mediate solutions that split the difference between the two parties in various ways are likely to expose judicial discretion most clearly. Thus judges may find it preferable to issue dichotomous solutions, denying their discretion by arguing that under the preexisting law one party was clearly right and the other clearly wrong. The losing party may be unhappy with the resolution,

but so long as he accepts the legitimacy of the "law," he may not perceive the judge as acting with his opponent.

The substitution of law and office for consent entails very major destablizing pressures on the triadic structure. For it was essentially his consent at every preliminary stage that enabled the losing disputant to continue seeing the triad as a triad rather than as two against one. If the loser does not specifically consent in advance to the norm, he must be convinced that the legal rule imposed on him did not favor his opponent. Thus the yearning for neutral principles of law found among contemporary lawyers.[17] And if he did not consent to the judge, he must be convinced that judicial office itself ensures that the judge is not an ally of his opponent. Thus the yearning for a professional and independent judiciary.[18]

Yet it is frequently difficult or impossible to convince the loser of these very things. First of all, many disputants are in a position to know or suspect that the law to be applied in their cases does favor their opponents. Most laws in most societies favor some classes of persons and disfavor others. Second, where the judge is a governmental or religious officer, then a third set of interests quite independent of those of the two disputants is interjected. One or both prospective litigants may perceive that the interests of the government or the church is contrary to his own. It is for these reasons that the judges and their professional defenders in most advanced societies spend such a large proportion of their dialectic and ritual talents promulgating and defending the prototype noted at the beginning of this study. Contemporary courts are involved in a permanent crisis because they have moved very far along the routes of law and office from the basic consensual triad that provides their essential social logic.

COURTS IN THE MEDIATORY CONTINUUM

Having said all these things, if we could now focus exclusively on judging in any further discussion of courts, the path would be fairly clear. However, if we turn to the work of those persons and institutions to which we normally award the titles judges and courts, we shall see that in reality they are simply at one end of a spectrum rather than constituting an absolutely distinct entity. Courts are clearly the least consensual and the most coercive of triadic conflict resolving institutions. The conventional prototype of courts has concentrated so heavily on the coercive aspects of courts, however, that it has tended to isolate judging unduly from other styles of conflict resolution. It is because elements of mediation and remnants of consent are integral to most court systems that the conventional prototype of courts is often misleading. Courts share with their fellow triadic conflict resolvers along the continuum the need to elicit consent. Among other things this means that mediating is not to be seen as an

antithesis to judging but rather as a component in judging. Most judicial systems retain strong elements of mediation.

In chapter 4 we shall examine one of the longest-lasting judicial systems in history, that of imperial China. It so intimately intermingled mediation with imposed, dichotomous conflict resolution that it has often been mistakenly characterized as an entirely mediatory judicial system. In the English legal system discussed in chapter 2, we shall discover that, even before the Normans conquered England, the ideal of Anglo-Saxon jurisprudence was a resolution mutually agreed by the parties under supervision of, and recorded by, a court. Dawson has pointed out that arbitration played a very large role in the development of English equity in the sixteenth and seventeenth centuries and in the judicial business of the Privy Council. In the Roman formulary procedure described earlier, it appears to have been fairly common for the praetor to serve as or suggest an arbitrator rather than a judge to the contending parties. In these instances we use the term arbitration rather than mediation because the third party is supposed to take account of the legal rights or claims of the contending parties in framing a solution for their approval.

Indeed, it would not be difficult to move about the world's legal systems endlessly multiplying the examples of the intermingling of mediation and judging. Communist legal systems might seem to have a special penchant for "comradely mediation" between fellow members of the working class, since communists define law as an instrument of class oppression. Indeed, both in the West and in China, we encounter comradely courts that seek to resolve family, neighborhood, and work place disputes without formal judicial proceedings. But we also discover that these bodies tend to mix mediation with imposed solutions backed by the coercive authority of the party and the state. Moreover, comradely courts are almost invariably embedded in a conventional court structure staffed by professional judges applying law, or sometimes party policy that is treated as an integral part of law. Most communist states now operate their economies on a system of supply contracts entered into between industrial enterprises. Contracting parties engaged in a dispute are confronted by a range of arbitration and judicial proceedings quite similar to those in noncommunist states. Indeed, more generally, mediation and arbitration in the context of the opportunity to go into court if the parties cannot come to agreement is a typical pattern encountered in both communist and capitalist states.

Mediate solutions are most feasible when the disputed matter is divisible or can be converted into something divisible. At first glance it would seem to be injury or trespass that would be least amenable to mediation and most subject to the rule of "an eye for an eye." The common law system has often been taken as the model of dichotomous resolution, since it

is a "strict" law system seeking to assign legal right to one of the parties and legal wrong to the other.[19] Yet the insistence of the common law that the central and usually sole remedy is money damages and that no resolution is possible unless one party can show he has been damaged in a compensable way reveals another dimension. The common law consistently converts indivisible disputes, that is, disputes over injury to person and property and disputes over the fulfillment or nonfulfillment of obligations into disputes over sums of money. Mediate solutions are always possible in disputes about money. Even a judge who must declare that one party is legally right and the other legally wrong need not resort to winner-take-all solutions. Typically he will award money damages that amount to more than the loser wants to pay but less than the winner claims he deserves. Moreover, where the Anglo-American law has developed equity as a means of resolving conflicts through remedies other than money damages, that is, through equitable decrees ordering someone to do something, it invokes the doctrine of "balancing of equities." That doctrine requires an equity court to shape remedies so as not to impose costs on one of the parties that far outweigh benefits to the other. In short, below the facade of dichotomous solution presented by Anglo-American courts lies the potential for mediation.

That potential is frequently realized in the courtroom itself, for instance when judge or jury reduces the amount of a damage award because the plaintiff, while legally right, was himself partly at fault. More fundamentally, money damages are mediatory because they allow the loser to substitute a money payment for the performance of some action to which he is strongly averse or for the acceptance of some distasteful retribution like suffering the loss of an arm because he has taken off someone else's.

However, in modern Anglo-American law systems, and for that matter in Continental ones, the area of mediation often moves outside the courtrooms. The bulk of conflict resolution through legal channels occurs by negotiation between the parties and their attorneys under the compulsion of eventual court proceedings should negotiations fail. To dismiss the vast bulk of conflict resolution by law in modern societies as somehow extrajudicial would both direct the student of courts away from the central phenomenon and lead to fundamental distortions of reality. For previously announced judicial rules and anticipation by the disputants of the costs and benefits of eventually going to trial are key parameters in such negotiations. They are not free bargaining based solely on the wills and immediate resources of the parties, but legalized bargaining under the shadow supervision of an available court.[20] Such negotiation is not purely mediatory, because the bargain struck will depend in part on the "legal" strength of the parties, that is, predictions of how each would fare in court. Yet such negotiations aim at, and in most instances achieve, a solution sufficiently satisfactory to both parties to avoid litigation. Failed negotiations may end up in court, where their judicial resolution sets the parameters for further negotiations. Thus the principal arena of modern legalized dispute settlement intimately intermixes elements of mediation and dichotomous solution, consent and judicial imposition.[21]

Conventional American legal scholarship has continued to draw a sharp line between mediation or negotiation on the one hand and judging defined by the prototype on the other. Two American scholars have recently delivered major attacks on that line.[22] Eisenberg has noted that, in both legal and anthropological literature, negotiation typically has been characterized as a matter of free bargaining determined entirely by the interests and power of the parties. In contradistinction to negotiation, litigation is usually seen as highly constrained by legal rules and principles. So far in this chapter, we have been concentrating on the elements of mediate settlement retained by judges engaged in litigation. Eisenberg is interested in the other side of the coin. He argues that, particularly when negotiation is carried on with the prospect that litigation may follow, negotiators invoke a great many rules and principles derived from the legal system and the more general set of social norms. Eisenberg finds major "continuities between the processes of dispute-negotiation and adjudication." While he deals largely with the diadic structure of negotiation between two parties, much of what he says would also apply to the triadic structure of mediation. Most importantly, his work shows that in actual, working legal systems, mediate solutions and legal rules are so intimately combined that the study of courts cannot proceed realistically without attention to both.

When Eisenberg comes to note the differences between negotiation and litigation, he places particular emphasis on the "binary" aspects of litigation. In part he is referring to the aspect of dichotomous, winner-take-all decision about legal right and wrong we have already noted. He also points to another aspect of dichotomous decision that we have not examined so far. Later in this chapter we shall note the important role of courts as fact finders. Even where facts cannot be established with certainty, Anglo-American courts typically make definitive findings of fact and treat them as certain even though they are established only by the preponderance of evidence.[23] This artificial dichotomy between the legally true version of the facts and the legally false one is, of course, closely related to the other dichotomy between legal right and wrong. For in order to assert that one party is certainly legally right and the other wrong, the judge must pretend that he knows with certainty what the factual situation was.

Later in this book we shall see that the desire for factual certainty marks most legal systems. In chapter 5 it will be noted that the standards of

proof were so high in Islamic courts that a second court system had to be established to handle the bulk of cases in which those standards could not be met. In chapter 3, however, we shall see that French judges are far more willing than English and American judges to admit formally that they cannot be sure what the true facts of the case are. Instead of adopting the "binary" tactic of Anglo-American judges, they often openly admit that the facts remain unproved. Then they resort to an elaborate set of rules of presumption that determine which party is to win the case when the facts are uncertain. For instance we shall see that when a vehicle is involved in a damage situation, and it cannot be established with certainty what happened, French law presumes that the operator of the vehicle is responsible for the damage done.

Coons has attacked the binary fetish of American courts. He proposes that in certain instances the judge admit that the facts are indeterminate and then make decisions that give a 50–50 split to the parties instead of finding entirely for one of the other. Because both parties are supposed to be equal before the law, they should be treated equally by the judge in situations in which the crucial facts that would establish who was legally right and who wrong cannot be established with a reasonable degree of certainty. Coons offers the example of A, B, and C, who are hunting together. B and C fire at the same time. A loses an eye to a stray piece of bird shot. It cannot be determined with any degree of certainty whether the shot came from the gun of B or C. Should A get no compensation because he cannot prove whether it was B or C who injured him? Would it not be more just if he were awarded a sum of damages and B and C each ordered to pay half of them?[24] Coons relates his proposal to the mediation style of the Far East which we shall examine in chapter 4.

The work of Eisenberg and Coons shows that the prototype of courts and, particularly, the sharp disjunction between litigation and other modes of dispute settlement are being brought into question. They both describe and prescribe mixtures of imposed office and law with more mediational, consensual elements. In doing so they mirror a great deal of the reality of actual court systems that has been somewhat obscured by viewing courts through the conventional prototype.

Judicial striving for consent can be found everywhere in court procedures and proceedings. In criminal law, plea bargaining is the mediation of the interests of prosecution and defendant. Ethnographic materials, including those on American trial courts, give us numerous examples of judges proposing one solution after another and, by threat, persuasion, and the application of the social pressure brought by the audience, moving both parties to at least profess satisfaction with one of them.[25] Indeed, most of the conventional attachment to adversary proceedings is based not on the

desire to heighten the level of conflict in judicial proceedings, but quite the opposite, on the need to have both parties present before the judge if he is to have any chance of creating a resolution to which both parties will consent. Every effort is made to preserve the appearance that the parties voluntarily come before the court. A striking feature of European and Anglo-American court systems in general is the extent to which the complaining party in civil suits must shoulder the burden of getting the other side into court with relatively little assistance from the court itself.

Perhaps more fundamental than these remnants of mutual consent to trial is the almost universal phenomenon that at least one of the disputants must choose to go to court. Only in isolated instances, such as the authority of the Soviet procurator to intervene in civil disputes,[26] are judicial services imposed on disputants neither one of whom wants them. In this sense while the parties no longer choose their particular law and their particular judge, at least one of them must choose the law and the courts.

In a substantial proportion of civil proceedings courts are used to settle contractual disputes in which the parties have in fact created the detailed rules of decision for themselves when they initially wrote the contract. Here again the partial phenomenon suggests the more general one. It is not only in contract disputes after all that the parties in consultation with the judge make the law. More often than not what we would label adversary proceedings are rituals in which three law speakers, the judge and the two parties or their attorneys, speak on until arriving at some verbal formulation of the law synthesized from their various versions. This can be seen at the simple level of a debate among tribal litigants about what the customs of the people truly are[27] and at the elaborate level of appellate opinions constructed out of bits and pieces of the opposing briefs.[28] Most courts make some law as they go along, and when they do so it is usually with the assistance of the parties.

Along the dimension of enforcement too we find the judge less far from the mediator than one might expect. In most societies courts have had only the most rudimentary enforcement mechanisms, often only a melange of voluntary compliance and self-help. Courts typically do not monitor compliance, and they reintervene to exact compliance only at the request of one of the parties. The reintervention often takes the form of a simple repetition of the previous order. The successful suitor even in a modern industrial society frequently finds that the decree is only the first in a long series of painful, expensive, and often inconclusive steps aimed at getting his remedy. Courts, we are repeatedly and rightly told, have neither the purse nor the sword. Perhaps more important, they rarely have the administrative resources to follow up on their resolutions. Most court systems seem to operate on the assumptions that both parties consent sufficiently to comply

voluntarily at least as long as some vague threat of further judicial action is maintained.

It is hardly surprising that most judges spend a good deal of time as mediators. It might once have been argued that the emphasis on mediation in oriental courts was wholly or largely a result of Confucianism or the like, so that the oriental judge as mediator was a peculiar and culturally determined phenomenon. Structural rather than cultural factors, however, seem to be at the root of the matter. Even where law and courts are accorded a high level of legitimacy, true adversary proceedings culminating in a dichotomous verdict are an optimal mode of conflict resolution only for parties who in the future need have no relations or only arm's length relations with one another. For those who must maintain close economic or social relations, proceedings according to the prototype of courts are unlikely to be satisfactory. Given the substitution of law and office for consent, the loser will rarely feel sufficiently satisfied with the most extreme form of the judicial process to fully reenter those relations with the winner. And the less legitimacy is accorded the regime of which the court is a part, the less capable it will be at restoring a working relationship.

There are some societies where even those in close and continuing relationships are willing to accept dichotomous solutions with good grace. We generally find, however, highly mediatory styles of judging in agrarian villages, with a strong tendency on the part of the villagers to avoid the more courtlike courts of the central regime. Frequently there is an adoption of mediatory styles even by the courts of the regime. The classic Chinese situation may represent an extreme upward percolation of mediatory styles.[29] The medieval English arrangement may be more typical. There the large landowners, who were not only at arm's length but often at sword's point, resorted to the king's common law courts for strict law judgments of disputes with one another. However, when conflicts arose between lord and tenant or between tenants in the context of communal or partially communal agricultural production, they were generally resolved either in the lord's own or the communal (hundreds) courts. There a bailiff or group of elders worked in more mediatory style.[30] On the other hand, in seventeenth-century England and colonial and nineteenth-century America, where there were large numbers of individually owned and operated agricultural units producing for a cash market, there seemed to be specially high levels of litigation.[31]

The tendency toward mediation even by formally structured courts is not limited to communal agricultural settings. In modern Japan, for instance, which imported a highly adversary and dichotomous judicial style along with the German Civil Code, mediation continued as the basic judicial mode in the villages. Adversary litigation became more prevalent with urbanization and most prevalent in auto accident cases in which the parties had no continuity of relationships. Yet the major Japanese industrial cartels engage in relatively little litigation with one another or their subcontractors.[32]

In Western societies as well, firms that must maintain continuous business relationships are not prone to litigation. Continuous business relation is usually expressed legally by contracts. It is precisely in contract relations that formal instruments of mediation and arbitration have exhibited tremendous growth in modern industrial states. Perhaps more important, as we noted earlier, negotiation under the umbrella of and within the restraints imposed by potential adversary proceedings with dichotomous solutions has become the principal mode of legalized conflict resolution in industrialized societies. And out-of-court settlement has become a major mode of resolution of even those conflicts that reach the stage of law suits. In criminal law, too, where the prosecutor has come to perceive his relation with criminals as a continuous one, plea bargaining has become the dominant mode of resolution in at least one highly urbanized, industrialized society, the United States.[33] Indeed, many observers trained to the prototype of courts are shocked by the informal, familial, conciliatory, and mediatory style of most American criminal proceedings.

Another clear example of the relation of mutual interdependency to the choice of mediatory rather than strict judicial proceedings is, of course, the endless proliferation of mediation and arbitration arrangements throughout the Western world for the resolution of labor-management conflicts.

In short, if one were to review all societies, or even to confine oneself to modern industrial and commercial states where one would most expect to find the prototypic court, one discovers that legal processes are not necessarily or entirely court processes, if we confine our definition of court to the prototype. For we frequently find intermediate rather than dichotomous resolutions. We find them aimed at the mutual satisfaction of the parties and conducted by their chosen representatives and often by a chosen third. We find them completed through procedures emphasizing mutual conciliation rather than adversary confrontation.

To put the matter another way, judges tend to share the same means of conflict resolution with other triadic figures, and most of those we would label judges engage in a great deal of mediation. Moreover, the substitution of law and office for consent has not been total even for those judges who act most independently of the wills of the parties in acquiring and resolving conflicts. As a result, even from the perspective of conflict resolution, where the prototype of court would seem to be most clear, we encounter grave difficulties. If we accept the prototype, we must admit that

most of those we call judges do a lot of nonjudging. And we must confine the area of judicial studies to a very thin slice of the real world and one so arbitrarily sliced that it would appear senseless to most of the participants.

In this discussion we have focused on the commonalities between mediators and judges, particularly in the mixing of consent and coercion. In chapter 4 another point about the close relation between mediation and judging will be illustrated at length. It is no coincidence that in most developed legal systems, we encounter mediation and litigation side by side. Neither can function well without the other. Litigation facilities are very expensive. The opportunity to settle a large share of disputes by mediation reduces the costs of courts to proportions the political regime is willing to bear. Conversely, without the threat of litigation if mediation fails, parties to mediation would be far less willing to accept mediate solutions. Most mediation is far less consensual than in looks. Behind it lies the threat of litigation.

Thus even if we remain strictly within the area of conflict resolution, the conventional prototype of courts must be substantially modified by an appreciation of the important role of mediation within systems that proclaim themselves judicial. A substantial share of the legal conflicts in most societies is resolved not by dichotomous but mediate decision, either rendered by a court itself or under the shadow of potential court proceedings. Much of what courts do is not adversarial in the sense of encouraging or requiring disputations between the two conflicting parties. It is enough that both parties present their views to one another and a third or with the option of going to a third. The style of the interchange may be cooperative, benevolent, or even familial rather than one of ritualized trial by battle. Moreover, where courts preserve a more or less mediatory style, they may subtly mix preexisting legal rules with rules that emerge from the interaction of the parties. To the extent that there are preexisting rules, they may be ones created by the parties themselves in a contract. After the final settlement, less may depend on those rules than on a newly emerging agreement or understanding or set of subrules that is suggested or elicited in the very process of settling the dispute.

Only the prototypic element of judicial independence remains relatively pure in the context of conflict resolution. For neither of the conflicting parties is likely to accept anything other than pure mediation from a third who is tied to his opponent. That is, so long as the third exercises any independent influence over the outcome, he must demonstrate his independence of the party who achieves the more favorable outcome if he is to achieve the consent of the less favored. It is when we turn from conflict resolution to social control that the independence element of the prototype comes into serious question.

The basic tension to be found in courts as conflict resolvers lies in their need to persuade the parties that judges and laws they have not chosen nonetheless constitute a genuine, neutral third. Most of the ties courts maintain to the mediator, and many of the hiatuses of coercive power that we observe in the procedures of courts for acquiring the parties and imposing and enforcing verdicts, stem from this tension.

Social Control

The conflict resolution role of courts has not been given pride of place here because it is the sole, "natural," or "correct" role of courts. We began with the conflict resolution aspect of the work of courts for three reasons. First, everyone seems to agree that conflict resolution is a basic task of courts. When we move, as we are about to, from conflict resolution to social control and lawmaking, we leave that consensus. Many students of courts would look at social control as a much more neutral function than that presented here and some would deny that courts do or should engage in lawmaking. Second, it is in the sphere of conflict resolution that the most favorable case can be made for the conventional, four-element prototype of courts presented at the beginning of this chapter. We have now seen that, even in that context, the prototype is misleading particularly in its third and fourth elements. Next we shall see that the first two elements of the prototype must be seriously questioned in the context of social control and lawmaking. Third, excessive emphasis on the social control and lawmaking aspects of the work of courts is likely to result in overstressing the role of coercion and underplaying the role of consent in the judicial sphere.

More important, such emphasis may lead to an artificial compartmentalization of judicial role that in turn may lead to a misunderstanding of crucial problems of judicial legitimacy. If the people or the regime approve the substance of the social control and/or lawmaking that courts do, the perceived legitimacy the courts may increase. Indeed it may increase quite independently of any legitmacy the courts acquire in the realm of conflict resolution. Yet the basic social logic of courts as conflict resolvers is so strong, particularly where links to consent can be maintained even as law and office are substituted for direct consent, that courts would be foolish not to enlist this conflict resolution social logic in behalf of their social control and lawmaking activities. Conversely, their social control and lawmaking activities may either emphasize or deemphasize the potential conflict between direct consent and its partial replacement by law and office. So social control and lawmaking activities may weaken or strengthen the social logic of courts in the conflict resolution area. The conflict resolution, social control, and lawmaking functions of courts must be seen as mutually interdependent. If we wish to view conflict resolution as first among equals, it is

because the social logic or the triad may be a more constant source of legitimacy than popular support of the substantive policies embodied in the courts' social control and lawmaking activities.

While an analytical distinction can be drawn between the conflict resolution and social control activities of courts, in practice they are almost inevitably intertwined. Particularly in dealing with go-betweens and mediators or with judges chosen by the parties and employing a rule formulated by the parties, one may encounter a resolution which appears to be based solely on the interests of the parties, unconstrained by overreaching social norms, customs, or laws. But even when mutual consent of the parties is the dominating concern, the two parties will usually find themselves mutually consenting to the proposition that their conflict should be governed by some general norm of the society to which they belong. While our two early Romans may have occasionally invented a wholly new legal rule for themselves, most of their energies were no doubt directed at achieving an agreed verbal formulation of a Roman tribal usage or custom. It was to gain assistance in this task that they later turned to a praetor.

Thus even absent the imposition of law and office, the resolution of disputes through reference to a third is likely to entail the enforcement of broader norms on the parties either directly or as bounding constraints. Only the go-between shuttling between parties embedded in two quite different societies is likely to be acting without exerting any social control over the parties.

It is of course in the substitution of office and law for consent that the social control aspects of courts become most evident and most clearly create tensions with conflict resolution. When the two parties must go to a third who is an officer, it is as evident to them as to the observer that they are no longer going to a disinterested third. Instead they are introducing a third interest: that of the government, the church, the landowner, or whoever else appoints the official. To be sure, even the Papuans who mutually choose a "big man" to settle their disputes do not expect him to be neutral in the sense of having no interests of his own. Indeed the bigger he is, the broader is likely to be the web of his interlocking social and economic interests among the various genetic, economic, and social units to which the disputants belong. But the requirement of mutual consent allows the Papuans, like modern corporations in search of an arbitrator, to settle on a third who will not see his interests, whatever they may be, as parallel to those of one but not the other of the parties.

When litigants do not freely choose their judges, a number of alternatives arise. First, when both parties perceive the interests of the regime to be hostile to their own, the parties will not go to the official court. Indeed, considering the whole of human experience, this avoidance of courts because they represent the interests of others or outsiders is more the norm

than the exception. Second, when both parties perceive the interests of the regime to be complementary or irrelevant to their own, they may go to court. Thus the bailiff of an exploitive, foreign, and hated feudal lord may be the perfect judge for two serfs in conflict over the rightful possession of a cow precisely because the lord doesn't care which of them milks it so long as he gets half the milk.

Third, when one of the parties perceives the interests represented by the judge as hostile to his own and favorable to his opponent, litigation may occur if the other party or the court has sufficient coercive resources to bring the reluctant party in, but the basic social logic of the court will disappear. Should the self-perceived underdog actually lose, he will see the situation as two against one and the role of the court not as conflict resolver but as coercer.

This phenomenon is, of course, clearest in criminal law, where coercion against one of the parties is at a maximum.[34] It is equally operative, however, in many noncriminal matters where the law clearly favors one class of parties over another. In most legal systems once a legal debt has been voluntarily incurred, the law greatly favors the creditor over the debtor who cannot or will not repay. The debtor correctly sees judges hearing debt litigation as essentially engaged in enforcement of the law through the harnessing of public authority to the efforts of the creditor to collect. Thus in most debt actions the debtor simply does not appear in court for the litigation and loses by default.[35] He correctly sees the judge as precommitted to his opponent's side. When a class of legally disfavored litigants has the political strength, it may attempt to prevent the courts from acting at all. In America indebted farmers have from time to time gotten "mortgage moratorium" laws through state legislature. Such statutes prevent judges from making mortgage foreclosure orders for a certain period of time. American labor unions belonged to the winning New Deal political coalition in 1932. They quickly used their new political power, first to strip federal judges of the power to enjoin strikes and later to set up a new body of law favorable to labor and a new court, the NLRB, to enforce it. They perceived the old law and its judicial enforcers as favorable to management.

It is to counteract these perceptions of judges as part of a two against one rather than a genuinely triadic structure that the prototype stresses the "independence" of the judge. More of the resources of legal scholarship and argumentation are spent on building up the ideology of judicial independence than on any other part of the prototype precisely because the court's basic social logic as triadic conflict resolvers rests on this element.

In the most basic and usually the least important sense, independence would mean that the judge had not been bribed or was not in some other way a dependent of one of the parties. But when we ensure this kind of

independence by creating the office of judge within some governmental structure, in a far more important sense he is not independent, for he is a dependent of those for whom he holds office. Thus explicators of the prototype have come to define independence not so much as independence from the contending parties as independence from those to whom the judge owes his office. They stress the institutional separation of courts from the remainder of the political system.[36] To make independence in this sense the touchstone of "courtness" is to measure from the most deviant case. Looking at all known societies, we find a number of typical locations within the political structure for judging. One is the whole body of the tribe, the folkmoot, in which, far from having separate judges, the entire polity does the judging.[37] In tribal societies organized under strong chiefs, the chiefs judge with or without the assistance of the elders and the body of tribesmen.[38] In village societies the elders do much of their own judging.[39] In feudal societies the feudal magnates do much of the judging. In empires almost invariably the administrator of the geographic unit is the judge in those matters not delegated to or retained by the conquered peoples. In short, the universal pattern is that judging runs as an integral part of the mainstream of political authority rather than as a separate entity. In those societies in which sovereignty can be located, the sovereign judges. In those in which political authority is not clearly concentrated, those who hold the dispersed authority judge.

JUDGING AND ADMINISTRATION

The congruence of administering and judging must be specially noted. Indeed, the observer who did not so firmly believe in the independence of judging might take judging for a special facet of administering. Both the judge and administrator apply general rules to particular situations on a case-by-case basis. Both tend to rely heavily on precedent, fixed decisional procedures, written records, and legalized defense of their decisions. Both are supplementary lawmakers engaged in filling in the details of more general rules. Both are front-line social controllers for more distant governing authorities. And in a startling number of instances both are the same person, and a person who draws little or no distinction between administering and judging.

The most striking example is the imperial administrator. The all-purpose geographic officer is the mainstay of empire, whether he be British district officer or the Chinese mandarin described in chapter 4. Such officers are there to keep the peace and collect the taxes—not unrelated functions. And for better or worse, in practice the imperial prefects are also the imperial judges. While in very wealthy empires, and at the higher levels of geographic subdivision, one may sometimes catch even substantial judicial subspecialization among the immediate subordinates of a governor, the norm is the all-purpose officer serving in the field.

The connection between tax gathering and judging is not confined to purely imperial situations. Much the same phenomenon is to be found in feudal monarchies. The English Exchequer described in chapter 2 is an obvious example, but in Tokugawa, Japan, as well, a good rule of thumb is that whoever is responsible for supervising the rice tax is also a judge.[40] Feudal systems like empires make liberal use of the all-purpose local administrator. And far more important than the fact that feudal magnates enjoyed the rights of the high justice and the low was that their bailiffs, who were primarily local agricultural administrators and tax collectors, also presided over the local baronial court.

As we shall see in chapter 2, English common law judges begin as royal administrators who dispensed the king's justice in the course of doing the rest of the king's business. And that great rival of the common law courts, the courts of equity, are the courts of the chief administrative official and tax collector of the realm, the chancellor. The justices of the peace were simultaneously judicial and administrative officers.[41]

We also encounter this affinity between judging and administration in the town magistrates, who are in many ways the equivalent of the general-purpose administrators of the countryside. From imperial Japan to colonial Massachusetts and medieval France, wherever a body of local notables has been vested with the authority to direct municipal affairs, it will be found with authority to do local judging. Indeed, the title "magistrate" has become an almost purely judicial one in the United States, although clearly the magistrates of colonial America, like those of medieval Europe, were all-purpose urban authorities.[42] Indeed, precisely because judging is traditionally an integral part of the local governor's tasks, in England and America we sometimes get the reversal of titles, as in those midwestern American states where county administrators bear the title "judge." The Roman praetors, whom we have seen play such a large role in early Roman litigation, were general city magistrates.

We can attribute this congruence of judging and administration to a number of factors. First of all, to return to our triad, it is as natural for two disputing parties to turn to a government official in places where there is a government as it is for two tribesmen to turn to the owner of many pigs where there is not. The local governor is a big man and thus "available" for judging. Like the owner of many pigs, the governor may import interests of his own into the resolution of the dispute, but also like the pig owner, he may counterbalance this drawback by his greater resources for eliciting the consent of or coercing the reluctant party. Second, endless disputes about the whole web of obligations owed by the locals to their lords, churches,

sovereigns, and chiefs inevitably arise in the course of bringing the demand of the higher to the lower, which is the core of feudal and imperial administration. Moreover, as the growth of the Exchequer courts shows, these disputes grow outward from conflicts between man and distant master to conflicts between local man and local man. "I cannot pay my taxes because loaned my neighbor money which he refuses to pay back. Get my money back and I will pay my tax." In these instances the administrator will find the settlement of disputes a routine part of his job. There is usually no one else to do the judging chores, and if he doesn't do them, he cannot get his job done.

Third, the mandarin or district officer is there to exert a certain measure of social control. Because the imposition of norms as a means of settling a dispute between two individuals is one mode of exercising social control, he will seize on it along with all the others.

COURTS AND THE REGIME

Perhaps the most important factor in explaining the historical congruence of judging and administering is to be found in a far broader aspect of the administrator's responsibility for social control. The origin of judicial systems in many parts of the world is to be found in conquest.[43] This is obviously true for imperial judicial systems such as those of Rome, China and the black empires of central Africa such as the Barotse. As we shall see in chapter 2, it is also clearly true for the common law courts imposed over the old moot and hundred folk courts by the Norman conquerors. Conquest created the British courts of colonial India and Africa as well as many other colonial court systems. The Supreme Court of the United States and the lower federal courts insofar as they operate on the old Confederacy are courts of conquerors. Even where courts are not directly imposed by force of arms, they will often be identified with the political regime or with distant rather than local authority.

Conquerors use courts as one of their many instruments for holding and controlling conquered territories. And more generally, governing authorities seek to maintain or increase their legitimacy through the courts. Thus a major function of courts in many societies is a particular form of social control, the recruiting of support for the regime.

When conquerors impose courts, often we discover a form of "extraterritoriality." The new courts serve to resolve conflicts between one conquering cadre and another or between a conquerer and a native when the native courts cannot be trusted to do the job. The claim to Roman citizenship was in part a claim to Roman courts and Roman procedure even in those portions of the empire where indigenous courts functioned. At their inception English common law courts were resorted to on the civil side almost entirely by Norman overlords in their relations with one another. The King's Peace enforced by those courts was largely a body of rules designed to protect Normans from Saxons. The clerical courts of the Roman Catholic Church, which are so important in the whole development of Continental judicial systems, are one of the foremost examples of such extraterritorial courts.

Aside from this extraterritorial value of newly imposed courts, the conqueror is soon likely to discover a number of other advantages they may yield. A scattered population living largely by customary and local law may be governed more efficiently by central authorities if a unified body of law is introduced. Moreover the conqueror often finds that rule is facilitated by reaching some working relationship with the indigenous notables and delegating considerable authority to them in exchange for their support. As a result of the interaction of these two considerations, an imposed body of law is typically particular laws and customs that have previously governed the notables transformed into a body of uniform law designated to govern everyone. In short, the conqueror melds his own and indigenous upper class law, universalizes it, and imposes it over the local and particular rules that have previously been the body of law of the peasantry and smallholders. The Normans combine their own law with that evolved by Saxon notables in their relations with one another to create a body of law that is essentially landowners' law. They impose that law over the existing plethora of local customary law and make it common to all of England. We shall see in chapter 2 that English law and courts evolved as part of the attempt of a conquering regime to create centralized and uniform rule over all its domains. Some centuries later the descendants of these conquerors conquered another domain. They combined their own law with Brahmin law, imposed it over local custom and caste rules and made it the law common to all of India.[44]

Thus a major function of courts in many societies is to assist in holding the countryside. They provide an extraterritorial court to adjust relations among the occupying cadres according to their own rules. They also provide a uniform body of national law in order to facilitate central administration and cement the alliance between conquerors and local notables.

There is yet another strand to this development. One mode of consolidating the legitimacy of an imposed regime is to provide more and better government services than its predecessor. Newly imposed courts might provide not only the advantages just indicated but speedier, fairer, more just resolutions of conflicts within the indigenous population. New courts might compete with indigenous modes of conflict resolution. To the extent that they won the competition, they would aid the central authorities in breaking

into the cake of local custom and bringing government influence down int
the villages. Judicial services, like medical services, are a way into the cou
tryside. Such new courts would provide a body of more specific, uniform
and flexible law that would appeal to those locals inhibited by the ol
customary law.[45] They would also provide an "independent" judge freer o
local dominant interests than the village elders or the folk courts. Thus wh
we often mean by an independent judiciary is one that serves upper class an
nationalizing interests rather than dominant local interests and thus on
more satisfactory to persons trying to break through the web of local inte
ests.[46] We shall trace this kind of phenomenon quite specifically in chapter
in describing the growth of English common law courts. In spite of a certai
antipathy to litigation in Chinese imperial administration, chapter 4 wi
show that local administrators also used the availability of judicial service
as a way of learning more about the countryside and exerting governmen
influence often in alliance with the local gentry.

Given these considerations, the congruence between administerin
and judging is hardly surprising, for judging, like administering, may b
principally designed to hold and exploit the countryside for the centr
regime. Indeed for roughly the same reasons, courts may appeal to thos
who wish to resist, revolt against or maintain their independence fro
central regimes. Thus the Cao Dai in Viet Nam built up its own court syste
as part of its sect building. Access to better judicial services than we
provided by the French was one of the benefits offered to members.[47]

SOCIAL CONTROL, LEGISLATION, AND CONFLICT RESOLUTION

The relation of the social control function to the prototype of cour
must be seen, however, in a far broader context than the special case of th
newly imposed courts of conquering regimes, even though the special cas
accounts for a large proportion of court systems. To do so it is convenient t
move from the substitution of office for consent to the substitution of legi
lation for disputant-originated rules of decision.

The substitution of law for the immediate consent of the parties to
particular rule is to be found widely in the dispute settlement as well as th
social control aspect of judicial work. Indeed, while it would be overl
ambitious to propose a general evolutionary hypothesis, laws of social co
trol seem frequently to arise out of recurrent dispute-settlement situation
Criminal law is the most obvious form of social control through law. Y
simple societies rarely distinguish private from criminal law. The moot an
more generally the popular witnessing of and participation in judicial pr
ceedings often seem to express the understanding of communal societie
that, where social units are small, any dispute between two members ha
immediate consequences for the whole. The whole therefore judges, an

judges not only with an eye to conflict resolution, but to its own more
general well-being. This understanding may also be expressed in the con-
ception of the crime of witchcraft, which is often seen as an interpersonal
dispute carried to a level of intensity dangerous to the community.[48]
Banishment, a popular form of remedy in relatively simple societies, is obvi-
ously a simple mode of conflict resolution through the physical separation
of the parties. But it is also a simple mode of social control by getting rid of
a troublemaker. And more deeply, its rationale is frequently the fear that
harboring a wrongdoer will bring the wrath of the gods on the community
as a whole.[49]

At English common law, criminal law was not clearly separated
from tort until the seventeenth century. Tort law represented the extension
of judicial conflict resolution services by the crown to individual disputants
where one man had injured another. Yet throughout the medieval period,
many of these same personal injuries, such as assault, were recognized as
breaches of the King's Peace. A single judicial proceeding might result in the
levy of money damages to be paid to the injured party and a fine to be paid
to the crown. Of course even today, in both common and Roman law
systems, a single act may give rise to both criminal and civil proceedings.[50] In
the earliest Roman law, all of the offenses that we would today label crimi-
nal were treated as civil injuries subject to private conflict resolution by
judges selected by the parties. Roman criminal courts with preselected juries
were first created for the peculiarly political crime of malfeasance in public
office and only gradually acquired general criminal jurisdiction.[51]

Even when we look at property and tort—the central pillars of
interpersonal conflict resolution—we discover important impositions of
social control through bodies of law apparently designed essentially to serve
only the private interests of the parties. In tort law the "reasonable man,"
and his equivalent in the civil law of delict, is a vehicle for importing into
personal disputes general social standards of how men should act. If one
does not act in accord with the general social norms defining reasonable
conduct, the court will award damages to one's opponent. Anglo-American
property law is essential feudal in origin and thus is marked by the intimate
mixture of rights reserved against one's equals and inferiors and obligations
owed one's superiors which characterizes feudal law. Even to the extent that
modern Continental property law claims to be purified of its own feudal
experience, it harks back to a classic Roman law of property that specifically
subjects the personal use of property to the interests of the state.[52]

At the point at which the judge is expected to apply general pre-
existing law in the settlement of disputes, that law becomes an element of
social control. That law must come from somewhere. Whether its origin is
in custom, or in the systematizing of earlier judgments, or in the fiat of the

rulers, or in some legitimated process of legislation, its very nature as a general rule applicable to future situations imports some element of social concern beyond the particular concerns of the particular disputants. The Marxists tell us that laws always embody the interests of the ruling classes. Certainly even those rules consciously designed to meet only the interests of prospective disputants cannot be totally neutral in the sense of embodying no general social vision of right and wrong or appropriate and inappropriate conduct. Even societies that profess no conscious desire to impose specific social norms in the process of resolving interpersonal disputes will in fact resolve those disputes on the basis of whether the parties have acted "as we always do things" or, alternatively, have "bloodied the arrows" or "spoiled the tjar."

Thus so long as a judge acts to impose preexisting rules on the disputants, he is importing an element of social control. Or to put the matter differently, he is importing a third set of interests, whatever interests are embodied in those rules, to be adjudicated along with interests of the two parties. In this sense the prototype's elements of judicial independence and judgment according to preexisting rules are always in conflict. For the preexisting rules almost invariably embody some public interest over and above and in contradistinction to the interests of the two parties. To the extent that the judge employs preexisting rules not shaped by the parties themselves, he acts not independently but as a servant of the regime, imposing its interests on the parties to the litigation. Chapter 2 is designed to illustrate this point at length.

PUBLIC REGULATION

When we reach the criminal law itself, and the other bodies of law that openly purport to impose the interests of the regime on individuals and groups, the vision of the triad becomes even more difficult to maintain, particularly where judicial office exists. If the judge is himself an officer of the crown, and the dispute is in the form of the *Crown* v. *Doe,* in what sense do we have a triad as opposed to a simple inquisition? We have noted that judging is a concomitant of sovereignty or at least political authority. When the whole tribe, or its representative jury, or the village elders meet to judge a transgression against the people or the community, in what sense do we have a triad? Yet over the whole range of our experience we observe acts that are defined as offenses against the collectivity judged by the collectivity itself or by "judges" who are supposed to be the representatives of the collectivity.

Thus even if we could preserve the notion of the completely independent third in the realm of "pure" conflict resolution, assuming such a realm existed, we could not do so in the realm of social control because of the very nature of judicial office and proceedings in that realm. Moreover, in that realm the legal rules applied to a litigation that in form is a dispute between one party—the community—and a second party—the alleged transgressor—are rules that consciously and openly were created by and for one of the parties. Thus to return to our prototype, the very facts that (3) the proceedings are adversary and (2) apply preexisting legal norms ensure that we will *not* have (1) an independent judge. For even in those few societies that seek to insulate the judge from the rest of government, he is expected to administer the criminal law, that is, to impose the will of the regime on a party being prosecuted by the regime. With extremely great care to the various rituals of independence and impartiality, some criminal courts may succeed in maintaining the appearance of thirdness. However, few of the defendants in contemporary Western criminal courts are likely to perceive their judges as anything other than officers of the regime seeking to control them.[53] The criminal defendant has not chosen his judge. Indeed, he would avoid the courtroom entirely if he could. But more important, the burglar correctly perceives that the judge is there as a social controller to enforce the law against burglary. He is not a neutral third who has no more attachment to the state's interest in preventing burglary than to the burglar's interest in pursuing his profession. It is not that the burglar does not grant legitimacy to the law against burglary. While they may excuse their own conduct in various ways, most burglars would acknowledge that their ought to be a law against burglary. It is precisely because they perceive the law to be legitimate and the judge obligated to enforce it that they know he is not a neutral third but a friend of the prosecution. So to put the matter somewhat differently, when the government or the people are one of the parties to a dispute, the triadic structure is necessarily weakened when the judge is either an officer of the government or is the people themselves.

While this weakening of the triad is clearest in criminal law, it is also fairly evident in all bodies of "public" law, that is, law setting out the relations between governor and governed. Those societies that engage in the greatest separation of powers or specialization of judicial function approach nearest to a perception of judicial independence. At least the private party engaged in a dispute with one segment of government is judged by an officer of another segment. But, as we have already seen, it is a far more typical governing arrangement to subsume judicial under administrative tasks than to create a judicial specialization. Moreover it is typical of Continental legal systems and their offspring to handle a substantial proportion of public law litigation in "administrative courts," which are less clearly differentiated from the administrative agencies than are the regular courts of the same

systems.[54] Even in the United States and Commonwealth countries, where constitutional separation of powers is most complete, a curious paradox arises because of the very inclination to separate. We encounter a common pattern in which the courts of the central government are relatively independent of the rest of that government, a federal system exists, and the highest court of the central government referees constitutional disputes between the central government and the federal units. In this situation the central court is frequently and often rightly perceived not as an independent third but as an arm of the central government imposing central control on the federal units. Particularly when the central court is imposing the will of a national majority over that of a local majority, as in many of the United States Supreme Court's race and religion decisions, the local majority sees the court not as an independent adjudicator but rather as the imposer of national uniformity over local diversity.[55]

We have argued that the substitution of office and law for consent gravely impairs the basic triadic logic of courts in the sphere of conflict resolution and even more particularly when courts are primarily engaged in social control. Another way of putting this is that precisely because we vest social control as well as conflict resolution in courts, their triadic position is impaired. For in most legal systems the litigants are aware that the judge is concerned not only with refereeing their two sets of interests but with imposing a third set of interests on them both.

Courts as Lawmakers

When we move from the conflict resolution and social control tasks of courts to their lawmaking tasks, the triad may be even further weakened. Nearly all contemporary students of courts agree that courts do engage in at least supplementary and interstitial lawmaking, filling in the details of the statutory or customary law.[56] In several major legal systems courts go far beyond interstitial lawmaking. The common law of the Anglo-American legal system is largely judge-made. Whether we should speak of the *jus gentium* and other praetorian law of imperial Rome as judge-made depends on whether we choose to call the praetors judges or administrators. Similarly, Jewish and Islamic law contain large components of judge-made law if we choose to call judicial the legal pronouncements of religious officials who frequently performed in triadic contexts.[57] Moreover, the affinities and overlappings between judicial lawmaking and administrative rule making are so great that they can be only artifically separated. When administrators do judging, it is often impossible to distinguish between "case law" and administrative law, as for instance in the mass of *harigami*, which formed an important portion of traditional Japanese law.[58] Even in modern Roman

law systems, where theoretically the lawmaking power of courts is severely limited, substantial and systematically articulated bodies of law have been judicially constructed from very slight statutory foundations.[59] Chapter 3 focuses on judicial lawmaking in the Roman law systems of Western Europe.

Much of the thrust of the judicial behavior literature[60] has been toward showing that there has been a high correlation between judges' political attitudes and their decisions for and against certain categories of litigants. This literature further suggests that these judicial attitudes fall into the same relatively coherent ideological patterns found in the national political culture. Considerably less success has been encountered in linking these patterns of political attitudes to the personal backgrounds of the judges, their modes of appointment, or the social and political structures in which they operate. Nevertheless, the brute fact of judicial discretion, even within systems of highly articulated statutory and constitutional law, has been more than sufficiently demonstrated. In short, while the development of a political psychology of judging may be still at an early stage, the behavioral literature has fairly convincingly demonstrated that many judges are not entirely "neutral" thirds but instead bring to the triad distinct public policy preferences, which they seek to implement through their decisions.

Aside from actual empirical discovery of widespread judicial lawmaking, it is clear that such lawmaking is logically required wherever law is substituted for consent in the triadic resolution of conflict. For if the third person must resolve conflict, and if he must do so by preexisting law, then he must "discover" the preexisting law. Because no human society has ever sought to set down an absolutely complete and particularized body of preexisting law designed exactly to meet every potential conflict, judicial "discovery" must often of necessity be judicial lawmaking.

In addition to the simple fact and logical necessity of judicial lawmaking, it is clear that many societies, including even those that seek to separate judicial from administrative and legislative office, quite deliberately vest major lawmaking functions in courts. In common law countries numerous instances may be found in which legislatures have given courts new jurisdictions without giving them new substantive statutory law for those jurisdictions. Alternatively, they may have written statutes whose key operative words are common law terms of art that incorporate past and invite future judicial lawmaking. In the United States the statutory creation of a federal labor contract jurisdiction without the provision of any substantive federal law of contracts and the Sherman Anti-Trust Act's condemnation of conspiracies in "restraint of trade" are obvious examples. In France the creation of an elaborate hierarchy of administrative courts with

extensive jurisdiction combined with a singularly cryptic body of statutory administrative law was surely an invitation to administrative judges to make their own law—an invitation that they have accepted.[61]

Two basic judicial lawmaking situations exist. The judges may make law in the sense that a generalized political authority does triadic conflict resolution, administers and enforces various social norms, and announces new norms without clearly differentiating among the three. Thus in Llewellyn's and Hoebel's famous example of Cheyenne lawmaking, the "soldiers," a group whose principal task is to supervise the tribe's collective buffalo-hunting operation, are confronted by an incidental task of conflict resolution. In this context they announce that from now on no one should borrow another's horse without asking permission.[62] In short, frequently when we speak of judicial lawmaking, we are really observing the phenomenon of merged judicial, administrative, and legislative lawmaking powers in a single political authority which we have already noted is far more common than judicial separation.

The second basic judicial lawmaking situation is one in which a separated and specialized judiciary nevertheless makes law. We have just noted that in theory, in fact, and in the consensus of scholarly observers,[63] all such courts do engage in lawmaking.

Both of these lawmaking situations arise from political economy in the most fundamental sense of that term. Most societies cannot afford or do not choose to allocate sufficient resources to provide three men or three institutions to do the job of governing that can be done by one. The general governor, whether he be king, chief, popular assembly, or district officer, will do the lawmaking and the judging because he has enough resources to do all the governing.

Even when a society does choose to nourish a number of governing bodies, including one or more primarily devoted to triadic conflict resolution, two other interlocking elements of political economy come to the fore. Separate courts are a very expensive commodity. Once in existence there will be strong and continuous pressure to pile additional tasks on them, to get one's money's worth out of them, so to speak. In the United States a strong constitutional tradition of separation of powers has allowed the Supreme Court to fend off some unwanted additional tasks. But that very same tradition has served as a basis for the Court acquiring enormous lawmaking powers. In the United States today federal and state courts are drawing school district lines, administering prisons, supervising railroads, prescribing personnel procedures for police departments, altering the time schedules and design features of vast construction projects, determining patterns of urban development, and preserving the seacoasts.[64] And one basic reason they are doing these things is that where there are tasks to be done, it will

frequently appear quicker and cheaper to assign them to an existing government agency than to create a new one. Thus even in the context of a strong ideological commitment to separation of powers, courts will pick up many lawmaking and administrative tasks simply because they are there.

Because there is a general tendency to economize by piling tasks on existing institutions, any expensive institution of government can be expected to have multiple functions. This phenomenon appears in preliterate, feudal, mercantile, and industrial societies. Multiple-function government institutions also have a second political economic advantage. Sometimes consciously and sometimes not, they create governmental redundancies that have significant survival value for the political system. In no society is politics marked by totally rational sequences or even certainty of outcome. In all governing systems, key links intermittently fail. Thus the existence of many alternative channels for accomplishing any given task of government may be an important guarantee of even minimal political efficiency. If the police cannot quell the riot, perhaps the army can. If the city government cannot provide vocational education, perhaps the state can. If the legislature will not respond to the needs of racial minorities, perhaps the executive will.

The earlier enthusiasm of students of organization for rationalizing administration through an extreme form of the division of labor, in which each unit did do and could do only one thing, has faded. The messiness of most governments, with their multiple overlapping and competing agencies, has certain advantages after all.[65] Governmental redundancy is not only an advantage in the sense that a new agency can be found to take over from a failing one. As proponents of mixed government and the division of powers have argued from ancient times, multiple government agencies may also serve as a salutary check on one another. But what has often been less clear is that agencies cannot check one another unless each is capable of performing at least some of the vital functions of the other. If each agency of government is so specialized that it cannot do anything but one preset operation in the total process of government, the assembly line that results will give each agency an absolute veto over the operations of government. For if any one withdraws, the product cannot be completed. In theory, perhaps, skillful bargaining with elaborate side payments among the veto wielders could produce both internal checks and a functioning government. In practice, the more each participant can meet other participants' threats of absolute veto by moving to perform the tasks of the threatener, the more likely we are to achieve the functioning moderation that seems to be the aim of the proponents of mixed government.

Thus it is precisely in those governments in which the independence of the judiciary is stressed, because of a desire to check and balance, that the judiciary is likely to acquire substantial lawmaking and administering

capabilities. In such governments the existence of checks and balances means numerous roadblocks along any policymaking avenue, so that a great premium is placed on exploring alternative avenues or detours. In those same governments, agencies pushed to watch and check one another necessarily acquire one another's capabilities. Thus the ultimate strategy for anyone wishing to get something out of government is to treat all agencies as multiple purpose, shopping among them until any one or any combination of them will yield what is desired.[66] Americans, for instance, have learned that if the Congress won't give them what they want, the president may, and if he will not, perhaps the Supreme Court will.

JUDICIAL INDEPENDENCE AND JUDICIAL LAWMAKING

In a great many nations judicial independence is conceived not in terms of a tripartite constitution with checks and balances but simply in terms of a professional judiciary sufficiently insulated from other governmental influences to operate within its own sphere under the rule of law. The courts of Great Britain and czarist Russia would show the range of this sort of independence. It may be found all the way from liberal constitutional systems emphasizing responsible but centralized political authority to pure autocracies. Obviously some political systems that seek to concentrate political authority will find that the triad is an extremely useful tool of conflict resolution. Such systems will then encounter the dynamics of the triad that we have already encountered. They may be willing to pay the costs to centralization of creating a relatively independent judicial authority in order to reap the benefits of increased capacity for conflict resolution.

Precisely because they want such triads for routine conflict resolution among private citizens while seeking to keep political power away from the judges, such regimes necessarily encounter difficulties with their judiciaries. For we have already seen that in the course of doing conflict resolutions, either under preexisting legal rules or otherwise, courts will make law. To express the same thing differently, they will exercise political power. When this inevitable phenomenon is encountered, both autocratic and constitutional regimes of centralized political authority can respond in one of four ways. First, they can yield and in the process become less centralized. Second, they can systematically withdraw from the legally defined competence of the judiciary all matters of political interest to themselves. Third, they may intervene at will to pull particular cases out of the courts and into their own hands. Fourth, they can create systems of judicial recruitment, training, organization, and promotion that ensure that the judge will be relatively neutral as between two purely private parties but will be the absolutely faithful servant of the regime on all legal matters touching its interests.

Various mixes of all four of these solutions are to be found in Western legal systems. England and most Continental countries have deviated sufficiently from theories of parliamentary sovereignty to allow considerable autonomy to their courts.[67] Nevertheless, the intersection of courts and powerful bureaucracies in these countries is particularly instructive and illustrative of tactic two. Let us suppose that courts actually sought to serve as triadic conflict resolvers between administrative agencies and aggrieved individuals. Let us also suppose that they sought to do so according to the prototype set out at the beginning of this discussion. Then an independent judge, applying the preexisting law in an adversary setting would seek to decide whether the bureaucracy or the individual citizen should triumph in a dispute. Such court proceedings would inevitably operate to substitute judicial fact-finding and lawmaking for administrative fact-finding and lawmaking. For bureaucracies typically operate under rather broad and vague statutory mandates and either uncertain or changing fact situations. Thus they are inevitably themselves supplementary lawmakers. Just as inevitably, then, when courts seek to resolve conflicts by the application of "preexisting" legal rules where an administrative agency is one of the parties, they must either accept the agency's supplementary lawmaking or do their own. But the agency's own lawmaking is likely to be highly particularized and deeply embedded in the very decision being disputed by the other litigant. Thus if, on the one hand, the court accepts the agency's lawmaking, in many instances it will also automatically be finding for it and against the other litigant. It is rather as if, in the ancient Roman situation, instead of the two disputants having to agree on the legal rule to govern their dispute, one disputant was authorized to impose a rule of his choosing on the other. If, on the other hand, the court does its own supplementary lawmaking, it has become willy nilly a sharer in the political power of the regime.

As we shall see in chapter 2, the British solution to this paradox has essentially been tactic two, that is, to selectively but systematically withdraw large areas of conflict from judicial resolution. British administrative law is principally a series of doctrines that command courts to defer to bureaucratic lawmaking and thus to render themselves incapable of providing a neutral and independent resolution of most conflicts that might arise between government and citizens. As we shall see in chapter 3 the French solution has essentially been tactic four. The French have created a corps of administrative judges who form an integral part of the bureaucracy itself, sharing its values and experiences. In addition the government exercises strong influence over the selection, training, promotion, and assignment of the regular judiciary in order to assure its loyalty to political authority. Finally, French "public law" itself instructs judges to favor the interests of the state over those of individuals when conflicts between the two arise. At

the Revolution of 1905, the czarist regime, apparently embarrassed by the highly independent and professional judiciary it had been nurturing for many years, adopted tactic three. It promptly set up special courts to bring revolutionaries to Siberia and the scaffold. These courts plucked what cases they liked from the regular criminal processes. Tactic three is also a favorite of military juntas that impose themselves atop going civil regimes, one of whose features is a relatively independent judiciary. While the regular courts function, courts martial take those few cases of special concern to the regime.

Read in one way, the prevalence of these four tactics is testimony to the real independence of judiciaries. In many nations at many times judges have been sufficiently their own masters to require even highly centralized regimes to adopt special tactics to avoid sharing power with them. Even in highly centralized regimes, judicial lawmaking is a reality that must be dealt with, just as it is in regimes that deliberately assign substantial lawmaking authority to the judiciary.

If judges then are inevitably lawmakers, what happens to our prototype of independence, preexisting legal rules, adversary proceedings, and dichotomous solutions, and more particularly, what happens to the substitution of legislation for legal rules consented to by the parties? In the first place, lawmaking and judicial independence are fundamentally incompatible. No regime is likely to allow significant political power to be wielded by an isolated judicial corps free of political restraints. To the extent that courts make law, judges will be incorporated into the governing coalition, the ruling elite, the responsible representatives of the people, or however else the political regime may be expressed. In most societies this presents no problem at all because judging is only one of the many tasks of the governing cadre. In societies that seek to create independent judiciaries, however, this reintegration will nonetheless occur, even at substantial costs to the proclaimed goal of judicial independence.

We will encounter numerous examples of this reintegration in chapter 2, which deals with English judicial independence. In the United States there has been a long debate over elected versus appointed judiciaries, with the key question being the extent to which judges ought to be subordinated to the democratic political regime. This debate is ultimately unresolvable because it involves two conflicting goals: one, that triadic conflict resolvers be independent; two, that lawmakers be responsible to the people. Indeed, it is because judging inevitably involves lawmaking and social control as well as conflict resolution that the tendency of judging to be closely associated with sovereignty or ultimate political authority, noted early in this discussion, is to be found in all societies.

Clearly, where judicial lawmaking occurs, adversary proceedings are something of a facade. If the judge is consciously seeking to formulate general rules for future application, his considerations must range far beyond the immediate clash of interests of the two parties. That is the message of the "Brandeis brief," with its parade of "legislative" facts, that is, facts about the general social conditions as opposed to the immediate facts of the dispute. Such briefs are open acknowledgment by bench and bar that the parties are essentially an example or sample of the social reality to be legislated upon rather than disputants whose conflict is to be resolved. Even where judicial lawmaking is less conscious or more surreptitious, the creation of general rules necessarily involves looking well beyond the two parties. Typically, the construction of such rules proceeds by appealing to custom, reasonableness, common sense, business necessity, fairness, or some other similar covers for considerations of general social utility. We shall see in chapter 3 that doctrine created by academic legal scholars plays a crucial role in the decision of judges in Roman law countries. This role is evidence of the extent to which such judges are making their decisions on the basis of general considerations of logic and social utility rather than simply trying to resolve the immediate conflict before them.

CASE-BY-CASE LAWMAKING AND THE PROTOTYPE

Most obviously, case-by-case judicial lawmaking violates the prototype's demand for preexisting legal rules. There has recently been considerable interest in prospective overruling.[68] This interest has been coupled with calls for more rule making and less case-by-case lawmaking by administrative agencies. At the base of both movements has been the feeling that a party should not be told that his past actions have been legally incorrect because of a legal rule that has been discovered subsequent to his actions. Indeed, the legal rule is typically discovered in the very process of deciding whether his past actions were correct or not. This uneasiness has arisen primarily in constitutional and regulatory agency adjudication. It is in these areas of American law that case-by-case lawmaking is most dramatically evident and thus where the prototype of courts is most clearly challenged. Yet the basic tension between lawmaking and the prototype exists in many other areas of law as well and in many nations. Chapter 3 will pursue in detail the tension between the pretense of Western European legal systems that all law is embodied in the codes enacted by the legislature and the reality that much of the law lies in "the doctrine" and "the jurisprudence," that is, the law gradually built up by scholars and judges. That similar problems arise in the Moslem world will be seen in chapter 5.

Indeed it is difficult to understand why the prototype has been so popular among Anglo-American commentators. For the common law system openly proclaims that its principal virtue is lawmaking through case-by-case adjudication. Then the resolution of conflict proceeds, not by preexisting rules, but by rules discovered in the very process of resolving the

conflict. Thus there is an important element of retroactivity in the common law style of lawmaking. The individual disputant does not know what rule will govern his actions until after he has acted. The rule is announced in the course of the litigation subsequent to his act.

Generally, common law systems tend to cover their deviation from the prototype of preexisting norms by two rationales. The first is a familiar one. Common law is essentially the ordinances of right reason indwelling in the race, or at least in the legal profession. New legal decisions only discover or draw forth the principle that has existed all along. Although a yearning for such principles still permeates the common law ideology, no one any longer believes that judicial lawmakers simply discover and apply the ancient legal principle. The second, or "gray area," rationale is more realistic. In effect it admits that judges make new law for current cases, but stresses the incremental nature of such decision making. There is a large body of well-settled statutory and case law. There are also some gray areas in which the law is not yet clearly settled and in which new case law is reasonably to be expected. The individual enters the gray area at his own risk. That is, where he commits acts that are at the edges of preexisting law, he consciously takes the chance that when the new law is announced it will run against him. This rationale is most likely to arise in precisely those cases in which new legal rules are announced that could not have been easily anticipated and that turn out to be highly unfavorable to one of the parties. Indeed, quite typically such a new rule is announced precisely because the judge wishes to extend the law to discourage future conduct of the sort engaged in by one of the parties. In the course of doing so, however, the initial conduct is penalized just as if there had been a law against it before it occurred.

Common law judicial lawmaking is only the most dramatic example of the more general phenomenon. So long as societies entrust courts with case-by-case lawmaking powers, and nearly all societies do, then conflict resolution cannot proceed solely by reference to preexisting legal rules. And where conflict resolution does not proceed by preexisting rules or, alternatively, by rules mutually consented to by the parties, then the loser of a case may well perceive himself to have been legislated against rather than impartially resolved. This fundamental deviation form the prototype is unavoidable. Judicial lawmaking necessarily creates a fundamental tension between courts and their basic social logic.

The Logic of Courts

To briefly summarize then. The basic social logic, or perceived legitimacy, of courts rests on the mutual consent of two persons in conflict to refer that conflict to a third for resolution. This basic logic is threatened

by the substitution of office and law for mutual consent, both because one of the two parties may perceive the third as the ally of his enemy and because a third interest, that of the regime, is introduced. Even within the realm of judicial conflict resolutions, no rigid prototype of court is applicable to the real world. Along one dimension we find a continuum of go-between—mediator, arbitrator, judge—in which most of those officials we normally label judges engage in a great deal of mediation and arbitration. Along another dimension we discover that most triadic conflict resolvers are deeply embedded in the general political machinery of their regimes and that the administrator or general big man as judge is far more typical than the holder of a separable judicial office. When we move from courts as conflict resolvers to courts as social controllers, their social logic and their independence is even further undercut. For in this realm, while proceeding in the guise of triadic conflict resolver, courts clearly operate to impose outside interests on the parties. Finally, in the realm of judicial lawmaking, courts move furthest from their social logic and the conventional prototype because the rules they apply in the resolution of conflicts between two parties are neither directly consented to by the parties nor "preexisting." Instead they are created by the third in the course of the conflict resolution itself. Thus, while the triadic mode of conflict resolution is nearly universal, courts remain problematical in the sense that considerable tension invariably exists between their fundamental claims to legitimacy and their actual operations.

Trial Courts and Appellate Courts—Fact-finding

So far we have not differentiated between trial and appellate courts, but it is useful to do so for certain purposes. Both trial and appellate courts make law. Both trial and appellate courts find facts. This latter point requires some clarification, given the normal American practice. It is often said that appellate courts are to hear questions of law but not questions of fact, which are to be left to the trial court. A similar practice obtains in many other common law jurisdictions. However, side by side with this appellate division of fact and law, we find many other legal systems that use or have used trial de novo at the standard mode of appeal. Where appeal is by trial de novo, the appellate court simply hears the whole case all over again.[69] Trial de novo is found in most nonliterate societies, no doubt in large part because of the difficulty of preserving trial court findings of fact to serve as a basis for appellate decision.

One of the principal differences in the development of the English common law courts (see chap. 2) and the Roman law courts of Western Europe (see chap. 3) lies in the realm of appellate fact-finding. The basic instrument of appeal developed in England was the writ of error. Issued by an appellate court, it ordered that the "record" of the trial court be sent to it

to be examined for error. In English trials the evidence was almost entirely oral or lay in the personal knowledge of the jurors. For jurors were originally summoned not to hear the facts but because they themselves knew the facts. Thus the written record of an English trial court would contain almost no factual material. It would be limited largely to the legal claims of the two parties and the findings of law made by the court. It might contain the conclusions of fact made by the court, but not the evidence on which they were based. At least until the eighteenth century, English trial courts rarely issued long written opinions. Indeed Anglo-American trial courts still feel no particular compulsion to do so and frequently do not. Thus the record on appeal often consisted of very cryptic entries of what legal claim had been made, which parties won and what remedy had been given. An English appeals court had little choice but to confine itself to spotting errors of law in the record. It could not have spotted errors of fact even if it wanted to, since it had none of the evidence before it.

Romanist procedures, on the other hand, emphasized the compilation by lower-level judges of a complete written record and analysis of all the evidence. There rarely was a trial in the English sense of everyone appearing at one time in a court room, telling their stories, and immediately receiving a verdict. Instead, a case proceeded by the gradual accumulation of papers in successive waves. The stack of papers literally became the case. If there was an appeal from the decision of the trial court, the whole file went up to the appeals court. The appellate court in effect decided the whole case all over again.

A number of causes for these differences in scope of appeal may be suggested. The introduction of the jury in England, discussed in chapter 2, is no doubt crucial. An appellate court cannot review what went on in the minds of the jurors. And, unlike professional judges, jurors cannot be expected to submit written records of their fact-finding.

The English preference for oral presentation of evidence preceded the introduction of the jury, however, and so is probably an independent cause of the difference. It is, of course, impossible for an appellate court to review oral evidence unless it holds the whole trial all over again. Modern Anglo-American courts may have a transcript of the oral evidence. Nevertheless, where oral evidence is the rule, an appellate court feels less capable of making factual judgments than the trial court which actually heard and saw the witnesses. Romanist procedures used a system of written questions and answers exchanged between the two parties as the mode of gathering evidence. Low-level judicial officers then shaped up the file of these questions and answers and supporting documents and presented them to the trial court judge. Exactly the same file could be presented to an appellate court. So Romanist appellate judges did not feel they were any

further from the parties, the witnesses and the evidence than the trial court they were reviewing.

Also, as we shall shortly see, appeal is essentially a device for exercising centralized supervision over local judicial officers. The Continental pattern was one of scattered trial courts supervised by more centralized appellate bodies. Appeal by trial de novo greatly strengthens the supervisory powers of the centralized appellate courts over their scattered subordinates. Dawson argues that the appeals mechanism was one of the principal devices used by Continental regimes to impose a uniform and centralized Roman law on local courts in place of the localized, customary law they had been employing in the medieval period. As we shall see in chapter 2, the English centralized the trial courts themselves and so had less need of a strong appellate mechanism to enforce the will of the central government on the trial judges.

Finally, although it is not clear whether we are dealing here with a cause or an effect, the English system of appeal requires far less governmental resources than the Romanist one. The Continental system, with its emphasis on a complete written record, requires a huge number of judicial officials to collect, correlate and analyze the huge pile of papers that become the case. A system of appeal that involves reexamining the whole file requires an enormous number of appellate judicial man hours. It took hours for a French appellate judge to read his "records"; minutes for an English judge. The limited appeal constituted by the writ of error is part of an overall English pattern of attempting to run a government cheaply and with as few government personnel as possible. Trial de novo on appeal is part of a Continental pattern that tolerated and even encouraged the growth of large governmental bureaucracies, judicial and otherwise.[70]

The differing consequences of limiting appeal to questions of law and employing trial de novo are important to the balance of power between trial and appellate courts. Trial de novo, of course, gives an appellate court far more general supervisory power. It sees the whole rather than only a small part of what the trial court has been doing. Moreover, where appeal is by trial de novo, the appellate court issues a final order binding on the parties. Where appeal is on questions of law only, the procedure is different. After the appeals court makes a binding declaration of law, it sends the case back to the trial court for retrial or a new decision consonant with the legal rule announced by the appeals court. Thus the trial court still has the final say. Given the complex interaction of law and fact, in many instances a trial court again can find in favor of the same party who won the first trial. The trial court can always argue that a proper analysis of the facts shows that, even under the new rule of law announced by the appeals court, the party who won the first time is legally right and the winning appellant legally

wrong. Of course such a decision may result in another appeal. It is not unheard of in the United States to have three or four rounds of this sort.

Many legal systems are quite aware of these balance of power problems. The U.S. Supreme Court must "remand" cases to state courts for final decision when it finds that the state court has made an error of constitutional law. This is an important curb on Supreme Court power. The Court has responded with the doctrine of "constitutional fact" through which it empowers itself to do final fact-finding of certain facts essential to a determination of whether the state has acted constitutionally. Thus, even on remand, state courts are frequently blocked from remanipulating their fact-finding so as to reinstate their initial holdings.

Many European countries use review limited to questions of law in certain spheres, particularly in connection with special constitutional courts or "courts of cassation." As we shall see in chapter 3, France, Italy, and Germany all have special courts to deal only with the question of whether a particular statute is constitutional or a particular administrative regulation in accord with its governing statutes. Such courts usually operate separately from but parallel to a set of regular appellate courts that use trial de novo. Since these special courts decide only special questions of law, they usually operate by remand to the trial courts. Often in Europe, however, we encounter statutory or constitutional provisions that require that the remand go to a different trial court rather than the one that originally handled the case. If the appellate court reverses the trial courts a second time in the same case, it may usually go on to make a final judgment itself.

In their nineteenth-century judicial reforms, the English recognized the weaknesses of the writ of error as a form of appellate procedure and sought to introduce trial de novo on appeal. The reforms were subsequently greatly whittled back but still remain in part. These developments are traced in chapter 2. The most important impact of the writ of error has been in the United States, which has strongly preserved the English tradition. American appellate courts have often greatly expanded the concept of "the record" so as to allow themselves to see more of what went on at trial. In theory at least, however, they still limit themselves largely to questions of law, leaving questions of fact to the trial court. And, as we shall see in a moment, while often breached in practice, this theoretical limitation still has important consequences.

In advanced societies, trial de novo frequently does not take the form of a complete rehearing of oral testimony, but instead involves appellate court review of the trial court record and then its own independent findings of fact. In the United States, trial de novo is usually a device for bringing cases from minor courts of incomplete jurisdiction and incomplete judicial status into higher courts of general jurisdiction and completely

judicialized procedures. For instance in Massachusetts, a defendant in minor felonies may choose to appear in the municipal courts, whose jurisdiction and sentencing powers are limited, whose judges need not be lawyers, and where prosecution is typically handled by the police rather than by a professional prosecutor. Should he be convicted, he may appeal for trial de novo to the Superior Court, which is a fully professional trial court of general criminal jurisdiction.

Trial de novo would therefore appear to be something more than a necessity forced on preliterate societies. This becomes even more clear when we note the extreme reluctance of non–de novo appellate courts to confine themselves to pure issues of law. In the United States the distinction between questions of fact and questions of law which is supposed to be the key to the limits of appellate jurisdiction, is a notoriously slippery one. It is so slippery that a whole new category, "mixed questions of fact and law," has been invented. In reality that category defines the huge number of instances in which appellate courts have refused to accept trial court findings of fact and substituted their own fact-finding under the guise of law finding. As we have noted, the Supreme Court has long held that it will make its own findings of "constitutional fact." But constitutional facts are often the same routine facts that the trial court has already decided. For instance, let us suppose a trial court has determined that a given speech did incite a riot and so convicts a speaker of incitement to riot. The Supreme Court will, under the constitutional fact doctrine, redetermine exactly the same factual question. For it will decide the constitutional issue of whether the speech constituted such a clear and present danger of serious social evil that its repression might be justified in the face of the First Amendment's guarantees of free speech.

This pull of appellate courts toward the facts can also be seen in the endless proliferation in the United States, Great Britain, and on the Continent of statutes, rules, and practices about how much evidence a trial court or administrative agency must have to support its decisions. Typically there has been pressure from the legislature or the courts themselves to keep appellate courts from substituting their own fact-finding for that of the decision maker who hears the evidence in the first instance. Two basic rationales underlie this pressure. One is that the first-instance trier actually sees and hears the witnesses, examines the physical evidence, and is simply closer in space and time to the disputed events than the appeals court that sees only a printed record. The second, particularly important where administrative agencies are the first-instance trier, is that the agencies are more competent to find facts in the highly specialized areas of their expertise than are appeals courts staffed by nonspecialist judges. This pressure manifests itself in various rules requiring appellate courts to pay various degrees of

deference to initial fact-finding by others. In the United States there are generally three grades of deference, although similar standards in different verbal formulations are to be found in other countries. Indeed the verbal formulations are far from uniform even in the United States. The strictest standard of deference is the "no evidence" rule used by the Supreme Court in review of state court fact-finding and the "some evidence" rule involved frequently where courts are reviewing agency fact-finding. The Supreme Court announces that it will reverse state courts on the facts in criminal cases only when the state record contains "no evidence" supporting conviction. While in theory this would mean that the presence of even a single bit of evidence tending to show guilt would be sufficient to obviate review, in practice the court has sometimes found that what others would consider quite a bit of evidence turns out to be "no evidence." Similarly, courts frequently say that they will not reverse on factual grounds an agency's decisions in areas of its peculiar expertise unless the record is totally devoid of agency fact-finding supporting its decision. In other words so long as the agency can show some evidence in support of its decision, the court will not make its own judgment on where the preponderance of evidence lies.

The next lower standard of deference is the "substantial evidence" rule. In various verbal formulations and degrees of severity, this rule has become the most typical rule of judicial review of agency fact-finding throughout the Western world. The court will look to see if an administrative agency has developed a substantial body of evidence in support of its decision. If it has, the court will not weigh the evidence of one side against that on the other and substitute its own judgment for the agency's about where the preponderance of evidence lies.

The lowest standard of deference is a "preponderance of evidence" rule. Under such a rule appellate courts generally purport to give great weight to first-instance fact-finding but nonetheless strike their own final balance of the weight of evidence on each side. Of course legislatures may seek to prevent court review of agency fact-finding altogether by providing that their decisions are final and unreviewable. As we shall see in chapter 2, courts tend to resist such limitations on their review power.

But why does this whole body of jurisprudence arise in legal systems that employ the general rule that appellate courts should not redetermine facts? Obviously, because there is such a strong thrust in appellate courts toward fact-finding that it cannot be contained by the general rule. And that thrust occurs because, while the principal job of appellate courts is lawmaking, they continuously seek to reiterate their connection with the basis of all judicial legitimacy, conflict resolution. So long as appellate courts do their lawmaking under the guise of doing substantial justice between man and man in particular cases—and they must do this if they

are to be perceived as and supported as courts—they will keep clawing their way back toward the facts. For disputes about the facts are at the root of a large proportion of the conflicts to be resolved.

This point is well illustrated by the evolution of "jury instructions" in the United States where, as we have seen, the tradition of the writ of error and the employment of juries severely limits review. Trial courts need not write lengthy opinions. The jury's deliberations are oral and secret and thus cannot be reviewed at all. The appellate court may conduct only an extremely limited review of the trial transcript because it is almost entirely devoted to the presentation of factual evidence and trial court findings of fact are not appealable. About the only thing in the record that is reviewable by an appellate court is the instructions given by the judge to the jury. These instructions are technically the judge's explanation of the relevant law to the jury. In reality they tend to be a review of both the facts and law by the judge indicating what verdict the jury ought to bring in if it believes one or the other of the two versions of facts offered by the parties. Thus criticism of the instruction becomes the vehicle for appellate court intervention against the trial court's findings of both fact and law, even though technically appeal is limited to issues of law. Nearly everything in the instruction is a "mixed question of fact and law" subject to review.

Instructions thus become a crucial intersection between trial court and appellate court power. As a result they tend to become a highly complex and technical legal ritual in which the trial judge seeks to protect himself against appellate reversal by carefully quoting various verbal formulae that previous appellate opinions have announced to be the proper ones. A conscientious trial judge, therefore, tends to write instructions that bounce back and forth between legal statements so technical that they can be understood only by those who know the appellate precedents and simple explanations designed for jurors. What began as a message from trial judge to jury has become a defense by trial judge against appellate judge.

At the very opposite pole of appellate fact-finding lies the distinction between judicial and legislative fact. In theory courts are supposed to confine themselves to the particular facts of the particular case. And because they are supposed to follow adversary proceedings, they are supposed to limit themselves to consideration of the facts presented by the two parties rather than ranging broadly over social data in a way permissible to legislatures drafting new laws. These limitations, rooted as they are in the conflict resolution aspect of judicial activity, work in a rough and ready way for trial courts. Where appellate court lawmaking is involved, they hardly work at all. Whether it be dressed in the language of American sociological jurisprudence, Continental free decision making, or a tribal chief's common sense concern with preserving his authority, it is clear that where an appellate

body seeks to formulate a legal rule, it must consider the fit of that rule to the society at large, not just to the two contending parties. In most societies the arguments presented to courts have either presumed or injected a great deal of general knowledge of the operation of the society. Courts usually hold that even the adversary model does not require them to be blind to what any fool can plainly see just because neither party got it into evidence. Doctrines like judicial notice have allowed either one of the parties or the judge himself to assume widely know social facts without proving them.

In the United States the "Brandeis brief," first invented for the special purpose of defending state regulatory statutes against constitutional attack, has now blossomed forth in nearly every instance in which an appellate court is in reality being asked to make new law. Today's brief on an environmental, desegregation, apportionment, or welfare issue frequently contains exactly the same data in exactly the same format as would a presentation to a congressional committee. The United States no doubt represents the extreme case. But on narrower fronts, for instance in the willingness of English and Continental courts to hear evidence on general commercial practices, most courts find some way of touching base with general social reality. Of course this is as true of trial as appellate courts, but the issue of just what range of facts a court may hear arises most dramatically at appellate levels. For appeals court lawmaking in rivalry to legislatures is much clearer than that of trial courts.

In spite of all these obvious connections of appellate courts to facts, it is still possible to focus on the trial as one of society's basic devices for finding facts.[71] Just how good trial proceedings are as a fact-finding device is a perennial question but also a misleading one if put too generally. It must always be remembered that the basic aim of a trial is to resolve a conflict or impose social controls, not to find the facts. Much of what may appear to be unsatisfactory as pure fact-finding, if we were applying general scientific canons for empirical inquiry, may be quite satisfactory in the specific context of trials.

The early stages of the English legal system and many tribal legal systems employed trial by ordeal, oath, combat, or divination. Explanation of these forms of trial in quasi-scientific terms is not totally incorrect. No doubt reference of factual issues to the Divinity, who was thought to be omnisciently willing to intervene in ordeals and combats in behalf of the person wronged, was a form of striving after accurate and complete fact-finding. And various physiological rationales for ordeal, such as that lying produces a dry mouth incapable of tolerating hot pebbles, are also no doubt partially correct. Above all it is clear that reference of a factual dispute to the gods or to ordeal will lead many parties who believe in the efficacy of these

modes of inquiry, and who know they have misrepresented the facts, to change their stories or withdraw from the litigation.

Quite apart from these attempts to bring primitive modes of fact-finding into accord with modern notions of empirical inquiry, however, oaths and ordeals can be seen as serving the specific purpose of trials even where they were not the most reliable form of inquiry. In the context of conflict resolution, the major virtue of a trial is that it provides a definitive point of termination to the conflict. The conclusion of a trial allows the disputants to stop trying to get even with one another. In this sense it is more important that a termination be provided than that a just solution be reached. For the endless continuation of a dispute often creates psychological, social, and/or economic costs that neither the parties nor the society is prepared to bear. The oath or ordeal provided both a catharsis and a dramatic climax which assisted in providing termination. Instead of leaving factual issues dangling, they were decided once and for all.

Even legal systems that seem to rely heavily on supernatural modes of factual inquiry are likely to employ them only as the culmination of more commonplace methods of inquiry. In most such systems the litigants are permitted first to tell their own stories and/or bring witnesses. Members of the community may also be heard. Thus something like a trial in the sense of a factual inquiry typically takes place before the trial in the sense of the oath, ordeal, or combat. Not always, but typically, the real power of the court is its discretion in assigning the ultimate burden of proof to one or the other of the two parties. In some systems of trial procedure, for instance when the ultimate proof is a simple sworn oath, as it is in the classic law of Islam described in chapter 5, whoever gets the burden is very likely to win the case. In others, for instance when the ultimate proof is carrying live coals without being burned, whoever gets the burden almost surely loses. So long as the court assigns the burden, however, it can do so in such a way as to favor the party whom the weight of empirical evidence gathered at the preliminary stage seems to favor. That is why we encounter one society in which a man is in the wrong if a hot rock burns his hand, and another in which he is in the wrong if it does not. Trial seems to do substantial justice in both. Preliminary factual inquiry, plus the discretion to assign the supernatural burden of proof, plus the perceived definitiveness of such modes of truth-finding may provide a mode of fact-finding roughly as accurate and far more likely to lead to the essential termination of conflict than would a simple factual inquiry alone.

The universal history of the rules of evidence is far too complex a subject to review here. As we emerge from dependence on supernatural assistance, the central problem of judicial fact-finding is the problem of

certainty. Testimony under oath is often the transitional stage. For the oath is in one sense an ordeal inviting divine intervention and in another an attempt to ensure more reliable human testimony. The medieval English practice of oath helping is instructive. The oath helpers were not witnesses who supported a disputant's assertion of fact from their own knowledge of the fact. They were persons who testified to the general reputation for veracity of the witness. They stood forth to share his oath and the risk of divine retribution, which was the lot of the false swearer. Oath helpers were unlikely to be forthcoming if the disputant's story rang false to the community.

Once confidence of divine intervention in routine trials is reduced, problems of credibility and weight of evidence arise. Few human societies have found probabilistic treatment of evidence morally satisfying. This is one of the many reasons so many triadic conflict resolvers resort to mediation of one sort or another. For mediation obviates the need to establish an agreed version of the facts. Most trial courts, of course, pretend to a certainty that they know is not there. If a real need for absolute certainty is felt by courts, the results may be untoward. It is probable that the Continental reliance on torture of the accused in part derived from the reluctance of judges to convict on any other basis than confession, which was one of the few certain ways to establish the facts of a crime.

Where fact-finding is done in the context of conflict resolution, reliance is typically placed on the stories told by the two disputants. The use of witnesses and physical evidence comes late in the development of legal procedures and is usually sporadic and incomplete. In part this is because the gathering of such evidence is expensive and time consuming. Thus even in advanced industrial societies, small claims courts aimed at quick, cheap disposition will usually operate on little more than the disputants' testimony. In part the reluctance to hear "outside" evidence rests on the fear of manufactured or falsified evidence, which is understandable where courts must rely on evidence brought in by the parties rather than developed by their own investigations. At least the judge may directly observe the demeanor of the party giving testimony. The well-known contrast between English and French legal developments that we have already touched upon illustrates this point. Until at least the eighteenth century, English courts were so reluctant to accept anything other than direct parol (spoken) evidence that they were severely hampered in resolving many kinds of disputes, particularly commercial ones in which ledgers, bills of lading, and the like were often crucial. French courts, on the other hand, followed Romanist procedure, which involved almost no parol evidence and relied almost exclusively on written interrogatories and responses and the examination of

documents. But the Royal Courts of England consisted of a mere handful of judges, while medieval France developed a huge judicial bureaucracy to gather, digest, and evaluate evidence.

In the seventeenth century notions of probability or relative certainty seem to develop side by side in theology, science, and law.[72] In Western societies a trial gradually comes to be seen as an empirical investigation designed to determine the weight of evidence on each side rather than as an attempt to discover the absolute truth. This progression from the search for absolute truth by divine intervention up to modern notions of balance of evidence should not be taken, however, as a necessary or universal phenomenon. Ethnographic materials show us some tribal judges who seek to assert definitive fact-finding capacity while others openly admit to weighing or balancing the evidence and picking the more convincing story.

With notions of weighing evidence, however, Western law develops a new, policy-oriented discretion similar to the earlier discretion involved in assigning the "trial" or "proof" to one or another of the litigants. In civil cases, where conflict resolution is the dominant mode, most legal systems hold the burden of proof even, the victory going to the party with the preponderance of evidence. Where social control is the dominant mode, as in criminal law, all sorts of shifts in the balance of proof may be made for policy reasons. To an extent these shifts may even predate the development of notions of probabilistic proof. For instance in medieval England, where treason and certain other crimes that the regime particularly wished to crush were involved, the defendant was forbidden to make a statement under oath, thus cutting him off from the best mode of establishing the certainty of his story.

Presumptions, burdens of proof, and per se rules are the standard form for manipulating factual issues to achieve policy goals. The easiest example is the presumption of innocence and the burden to prove beyond a reasonable doubt in modern Anglo-American criminal law. Just as the medieval English law made it more difficult for certain defendants to prove their innocence, so modern law makes it more difficult for the state to prove their guilt. The presumption of innocence is not some fixed truth but a declaration of social policy. For various reasons we prefer to make it easier for the criminal accused than for the state.

Where social control is involved, however, there are numerous instances in which it appears preferable to shift the burden of proof in the other direction. The per se rules frequently encountered in American labor and antitrust law are good examples. When a court says that a tieing agreement is a conspiracy in restraint of trade per se, it is simply relieving the government of the burden of providing that the accused's actual conduct did

in fact constitute such a conspiracy. Courts and legislatures can make very fine adjustments in burden of proof, for instance, by making a presumption rebuttable or irrebuttable. Modern developments of "absolute liability" or "liability without fault" are a major example of shifting burdens of proof for reasons of social policy. The fundamental rule in both common and Roman law systems for many centuries was that if one person injured another purposely or through negligence he or she must pay damages to the person injured. But where there was no intent to injure and no negligence, there was no liability to pay damages. Increasingly, however, in the twentieth century, legal systems assign absolute liability to compensate for injuries whether or not there was evil intent or negligence. The story of how this was done in France is told in chapter 3. This absolute liability is often introduced because in the conditions of modern society it becomes too hard to prove negligence, or at least just how negligent each of the parties was.

"No fault" collision insurance assigns absolute liability to the insurance company no matter how much or how little the driver was at fault. No fault laws are passed in part because we have learned that trials are a cumbersome, costly, and ultimately unsuccessful way of discovering which driver was in fact ultimately at fault.

Similarly we are increasingly making manufacturers absolutely liable for the injuries caused by their products. In part this is an attempt to make manufacturers as careful as possible in their production processes. In part, however, it is a recognition that in modern, mass production, assembly line technologies, it is often impossible to prove precisely how and where the manufacturer was negligent. If the steering wheel of your new car comes off in your hands, it is evident in a common sense way that the automaker was negligent. But it may be very difficult to legally prove exactly which worker at exactly what place on the assembly line committed precisely that act of negligence which caused the wheel to come off. The tendency, therefore, has been to relieve the injured party of meeting the whole burden of proof of negligence. That burden was easier to meet in a simpler society where it was easier to know exactly who had done what.

Behind this politics of fact-finding lies the fundamental reality that courts are far from perfect fact finders. On the one hand, those who have contravened social controls are often in an excellent position to conceal the facts of their misdeeds from courts, particularly when they are themselves organizations of great resources like corporations or unions, or cabals of treasonous barons. On the other hand, many of those who fall afoul of social controls have so few resources that they can hardly be expected to develop the necessary facts for their own defense. Thus the adjustment of the fact-finding incapacities of courts to the relative power of those subjected to social controls is itself a significant aspect of social control and ultimately of political authority.

The Uses of Appeal

As we noted earlier, one of the principal virtues of a trial is that it provides an official termination to conflict, relieving the disputants of the necessity of further reciprocal assertions or retributions. But too much finality may be disturbing to the losing member of the triad. One of the functions of a "right of appeal" may be to provide a psychological outlet and a social cover for the loser at trial.[73] For appeal allows the loser to continue to assert his rightness in the abstract without attacking the legitimacy of the legal system or refusing to obey the trial court. Indeed the loser's displeasure is funnelled into a further assertion of the legitimacy of the legal system. Appealing to a higher court entails the acknowledgment of its legitimacy.

We also noted earlier that the principal problem of the triadic form of conflict resolution was keeping the loser from perceiving the final situation as "two against one." Appeals mechanisms are devices for telling the loser that if he believes that it did turn out two against one, he may try another triadic figure. Perhaps just as important, the availability of appeal allows the loser to accept his loss without having to acknowledge it publicy. The purpose of a trial is to effect a termination of conflict. But too abrupt a termination may be counterproductive of true conflict resolution. Appeal, whether actually exercised, threatened, or only held in reserve, avoids adding insult to injury. The loser can leave the courtroom with his head high talking of appeal and then accept his loss, slowly, privately, and passively by failing to make an appeal. We often see appeal principally as a mode of ensuring against the venality, prejudice, and/or ignorance of trial court judges and of soothing the ruffled feelings of the loser. Appeal does indeed serve their functions, but it does so by the imposition of hierarchical controls on trial court behavior. A great deal of interest to political scientists lurks in that hierarchical element.

We have already noted that in a predominant share of the governing systems that have existed in the world, judging is either a facet of administration, or is closely aligned with it. It is a commonplace of administrative lore that no matter what the theory, Weberian hierarchies do not give the top or center adequate control over rank and file administrators in the field. Such control will not occur unless a number of alternative channels of information are available that can be cross-checked at or near the top. The best-known modern example is obviously the Soviet Union, with its trade union, government, party, control commission, and police

hierarchies superimposed on one another. When administrators hold courts, appeal becomes such a mechanism of control. A "right" of appeal is a mechanism providing an independent flow of information to the top on the field performance of administrative subordinates.

It is not only an independent flow, but one highly complementary to the normal administrative reporting. Such reporting usually takes the form of summarization. Each field administrator handles hundreds of thousands of bits of information about local affairs and his own performance. Let us suppose that each passed everything he knew along to his superiors. Each superior supervises a number of subordinates. Each would be flooded with millions of bits of information—far more than he could handle. So normally each field administrator passes to his superior only a summary of the information he has developed. And each superior passes on only a summary of those summaries to his superior. In the process much information is necessarily lost. And not unnaturally, what tend to get lost most easily are those instances in which the subordinate has done badly. The superior never sees the full details of any specific things his subordinates have done. The summaries he sees tend to emphasize his subordinates' successes and leave out the failures. ("Last year this office handled over three thousand claims of which 91 percent were settled within forty-eight hours.")

The appeals process cuts across this summarization because the unit of appeal is a single case, in all its details, rather than a summary of overall performance. It is not a single instance chosen by an administrator to illustrate his success, but an instance chosen by a consumer of administration who feels that the administrator has failed. Finally, not only is the appeals case a detailed sample of administrative work product, but it is a partially random sample. The distribution of cases appealed is not determined by either the goals of the administrative subordinate or his superior but by the nonadministrative motivations of individual litigants. Let us suppose that a chief engineer wishes to check the performance of his auto assembly line. His normal mechanism is to check the statistics reported by his foremen on the number of engines mounted, doors attached, and so on, including the final figures on cars produced. Or alternatively, he could look at every hundredth car. Appeal would allow him to check in yet another way. The customer who got the "lemon" would bring the car in and insist that the chief engineer take it all apart to see exactly what things had been done wrong on the line.

Thus, on the one hand, while appeal is a partially random sample, it is one loaded toward administrative failure. It will not be every fifth car or every green car that is sampled, but some of the worst cars and very, very few of the best. On the other hand, the administrative superior may impose some patterning by making it known what kinds of appeal are most likely to

be successful. We have already seen that English appeals courts at one time said they would listen to appeals on questions of law but not of fact. Thus they got to see cases in which trial courts had made mistakes of law, but not those where the court had done bad fact-finding. Field administrators can also partially control the pattern of appeals. In chapter 4 we shall see that a Chinese local magistrate who did not wish his superiors to know about his performance in a particular dispute could pressure the parties to settle by mediation. A mediated settlement could not be appealed.

At the opposite extreme, it is possible to run an appeals system that takes 100 percent or at least a very full sample. In Tokagawa Japan, every opinion of a trial court was prepared as only a draft of an opinion by the higher authorities. Each draft went forward and came into legal force only after the higher authorities had approved it. In this system, then, all cases are appealed. Most American states provide one appeal in criminal cases as a matter of right. The common practice of the defense bar in many of those states is routinely to file an appeal for every losing defendant. Some states have mandatory first appeals for all cases in which the punishment is severe. These state systems approach 100 percent appeal. Whenever a central government seems to be attempting 100 percent sampling, however, the reality will usually turn out to be otherwise. Thus in states where a first appeal is routine, the intermediate appellate court that hears such appeals will usually deny 90 percent of them in one-line orders that show that they were given only a cursory glance. The appellate court will decide the other 10 percent. And of those only a very few will move on to a further appeal to the state supreme court.

Of course, where there is a separate judicial hierarchy, appeal is typically the central mode of supervision by higher courts over lower, and reversal on appeal a central form of administrative sanction. In such instances the need for multiple channels of information and control leads the top to demand other institutions in addition to appeal, such as judicial conferences, centralized personnel systems, and administrative reporting, to increase their control over their subordinates.

The insistence, so frequently encountered, that the chain of appeal eventually arrive at the chief, the king, or the capital, instead of stopping at some intermediate level, is difficult to explain except in terms of centralized political control. If the only function of appeal were to ensure against corruptness or arbitrariness on the part of the trial judge, then appeal to anyone even a single step higher in the scale of authority would be sufficient. In the American states we have just discussed, for instance, appeals could all stop at intermediate appellate courts. Why should any go on to a state supreme court? Its justices are really no more capable of righting the injustices done to the loser in the trial court than are the appeals court judges who first

heard the appeal. The top insists on being the ultimate level of appeal because it serves its purposes, not those of a losing disputant.

Of course, just as one of the functions of any appeal may be to reduce the psychic shock to losers, so the right to "take the case all the way to the Supreme Court" provides even greater catharsis for the loser whether he employs it only rhetorically or actually does it. Yet even at this personal level, and quite apart from the question of hierarchical control, the top is likely to see advantages in preserving a right of ultimate appeal. Earlier we noted that the extension of judicial services outward and downward is a device for wedding the countryside to the regime. So the preservation of appeal to the chief–king–emperor–capital is a device for keeping the strings of legitimacy tied directly between the ruled and the person of the ruler or the highest institutions of government. In the imperial Chinese legal system that will be examined in chapter 4, cases involving capital punishment were automatically appealed from local courts through intermediate appeals courts and ultimately to the emperor himself. The accused was shipped along with his appeal up the appeals ladder. When the death sentence was ultimately commuted, the commutation was ceremonially delivered to the prisoner in the capital and depicted as the personal mercy of the emperor. When the death penalty was confirmed, the prisoner was shipped back down the appeals ladder. He was dispatched on the local execution ground of the trial court that had convicted him initially. No clearer declaration of the political purposes of appeal could be made.

Conversely, the ability to reach down occasionally into the most particular affairs of the countryside provides an important means of reminding the rank and file that the rulers are everywhere, that no one may use his insignificance or his embeddedness in the mass to hide from central authority. Thus the personal ruler, be he Zulu war chief or medieval monarch, rarely totally gives up his personal participation in appeals. Nor do modern central governments often provide that there be only a single appeal from trial court to regional appeals court without any opportunity to go on to a central appeals court.

Thus appellate institutions are more fundamentally related to the political purposes of central regimes than to the doing of individual justice. That this is true is evidenced by the nearly universal existence of appellate mechanisms in politically developed societies, even those whose governments place little or no value on individual rights. In chapter 5 we shall examine the absence of appeal in Islamic law as a test of this hypothesis about the relation of appeal to centralization of political authority.

Even if judges did nothing but conflict resolution, appeal would be an important political mechanism both for increasing the level of central

control over administrative subordinates and for ensuring the authority and legitimacy of rulers. When we enter the realms of social control and lawmaking, the multiple functions of appeal are even more apparent. When trial courts or first-instance judging by administrators is used as a mode of social control, appeal is a mechanism for central coordination of local control. The "questions of law" passed on to the appeals courts are in reality requests for uniform rules of social conduct and indicators of what range of case-by-case deviation from those rules is permissible by first-line controllers.

A partial breakdown of this supervisory mechanism is largely responsible for the wave of discontent with American criminal courts. In most Western criminal law systems there can be no appeal after a plea of guilty. Something over 90 percent of American criminal cases are settled by a guilty plea or its equivalent, frequently as a result of specific or tacit plea bargaining. As we have noted, appeals courts do not normally consider questions of fact. In the United States "disposition," or sentencing, that is, the decision about what to do with the person of the convicted criminal, is not normally reviewable by appellate courts.

These three factors combine to create a major anomaly, at least within the Western political and administrative tradition. The basic business of American criminal courts is not the triadic resolution of disputes cast in the form of the *People* v. *John Doe*. And this is quite apart from the point that casting criminal law enforcement in this ritual form of conflict between individual and the state is a transparent fiction. Most American trial courts rarely bother even with the ritual of trial. Their time is spent disposing of the bodies of those who have pleaded guilty. Thus they are clearly administrators distributing the scarce sanctioning and rehabilitative resources of society among a mass of "applicants." In this sense trial courts have ceased to be courts.

This absorption of "courts" in administrative tasks is not particularly surprising or alarming in view of the natural affinities between judging and administration that we have repeatedly noted. The anomaly arises precisely because we persist in formally viewing these administrative tasks as judicial. As a result we get an enormous volume of particularized administrative discretion without any of the hierarchical supervision we normally exercise over low-level administrators. In short, what trial courts really do, sentence, is not subject to appellate court review. And because trial courts are *courts* in a political system that endorses judicial independence, they are not subject to any other form of hierarchical supervision. Thus they are one of the few agencies of government in which rank-and-file operators are subject to almost no supervision at all in the wielding of enormous discretion. Imagine

the loss in legitimacy that any bureaucratic agency would suffer if the clients were told that the clerks at the windows had broad discretion and their decisions were not reviewable by their superiors.

This American situation is an example of the need to focus clearly on appeal as a mode of hierarchical political management, as well as a guarantee of fairness to the accused, if we are to understand the actual operation of real political systems.

In this context social control and lawmaking are usually intimately connected. Appeal is not simply a device for ensuring a certain uniformity in the operations of rank-and-file social controllers. It also ensures that they are following rules or laws or policies of social control acceptable to the regime. Indeed, appeal is a key mechanism in injecting centralized social control into the conflict resolution activities of courts. For appeal is the channel through which the central political authority assures itself that its rank-and-file conflict resolvers are applying legal rules that resolve conflicts in the desired directions. Earlier we noted that the substitution of legislated law for rules created by the mutual consent of the parties introduced a third set of interests into two-party litigation, whatever interests were embodied in the legislation. At least in large and complex societies, trial courts are too many and too localized to articulate this third set satisfactorily. Appellate courts are more suitable.

Tort serves as a good example. When social policy is stable, trial courts will finally dispose of most tort cases. The "reasonable man" doctrine applied by juries will impose sanctions on those who deviate from commonly accepted standards of conduct. The parties will see their conflict as existing within fairly clearly preestablished rules enunciated in the pattern of previous cases. It will be resolved by a judgment of their peers about who was at fault or more at fault. However, when new social and economic policies are to be introduced, appellate courts will become active, enunciating new tort doctrines, or theories, and creating or plugging exceptions to existing rules. Thus, during the rapid industrialization of the United States in the nineteenth century, when allocating the costs of industrial accidents became an important economic issue, the high courts of the states created or expanded the contributory negligence and fellow-servant rules and the doctrine of assumed risk. Trial courts still resolved conflicts between employer and injured worker and controlled deviations from accepted standards of proper industrial conduct. But they did so within a set of overarching doctrines that injected the national interests in industrial growth as a counterweight to the interests of injured workers.[74] We have already noted the role jury instructions can play in the relations between trial and appellate courts. When appellate courts are striving to impose centrally determined uniform policies, such instructions will serve as a battleground where, no matter what he says to the jury, the trial judge is threatened with reversal if he does not achieve outcomes satisfactory to the central authorities.

On the broadest scale, of course, constitutional review by the highest appeals courts in federal systems has been a principal device of centralized policymaking. A good example is school desegregation in the United States. And appeal has been used in highly centralized political systems such as that in France as one of numerous routine mechanisms for controlling and coordinating government agents in the field. Appeals courts can and do act in this capacity whether they are themselves doing a great deal of lawmaking or acting as enforcers of law made by others. An interesting variant is the sending of trial judges on "circuit" from the capitol or the insistence that suitors travel to the capitol for trial—both important tactics of the medieval English monarchs for centralizing political authority, as we shall see in chapter 2. It is because England had this special overlay of national trial courts, above the essentially local county and baronial courts, that a large proportion of English common law has been made by what are technically trial courts, while most of American judicial lawmaking occurs in appeals courts. Far more typical are the arrangements of the nineteenth- and twentieth-century European-based empires, all of which provided for appeal either to a high court sitting in the metropolis or a territorial high court employing metropolitan law and/or staffed by judges trained as imperial servants. The British system of appeal to the Privy Council is the best-known example.

Quite obviously, if there is any judicial lawmaking within a territorially dispersed system of courts, then a pyramid of appeal is necessary in order to assure that any central body of law is relatively uniformly administered throughout its domain. For instance, in spite of its onerous constitutional duties, the United States Supreme Court devotes about 40 percent of its opinions to creating uniform interpretations of federal statutes among the intermediate federal courts of appeal. In a unitary (as opposed to federal) non–common-law state, in which courts do not enjoy the power to declare laws unconstitutional and in which intermediate appellate courts exist, about the only legal rationale possible for the existence of a high court of appeal is the need for uniformity of statutory interpretation. Indeed, that does seem to be the major legal task of most Continental high courts described in chapter 3.

Earlier we noted that even if all courts did was conflict resolution, appeal would serve the regime's purposes of hierarchical control by providing a sample of low level administrative performance. When we focus on the lawmaking activities of courts, we can see that appeal is a mechanism that sorts out unresolved issues of public policy and moves them toward the top

for decision. In some cases the questions of law appealed from trial courts represent instances in which the trial court has deviated from the uniform national rule and will be brought back into line by an appeals court. In others the question of law arises because there is no national rule and the appeals court is being asked to make one. This is why appeals courts inevitably become lawmaking bodies even in legal systems that denigrate judicial lawmaking.

To emphasize this function, however, is to assert that most high courts of appeal are barely courts at all. That is, while in form they may be engaged in finally resolving one particular dispute between two particular litigants, their principal role may be to provide uniform rules of law. Naturally such rules must be based on considerations far broader than the concerns of the two litigants, essentially on considerations of public policy that may have little to do with the particular litigation. At worst the litigants are irrelevant; at best they are examples or samples of the general problems to be solved.

Political scientists and lawyers concerned with the legitimacy of courts have tended to concentrate on appellate courts. Appellate courts are the furthest removed from the basic social logic of courts. As a result courts appear far more problematic to scholars than they do to the citizenry. Nevertheless, the study of appellate courts makes clear that courts always exist in a state of tension between their basic source of legitimacy as consensual triadic resolvers of conflict and their position as government agencies imposing law on the citizenry. To put this matter somewhat differently, the social legitimacy of courts as a universal social device for conflict resolution and the political legitimacy of courts as a particular segment of a particular political regime are sometimes additive and mutually supportive and sometimes quite the contrary.

Popular Courts

Early in this discussion we noted a certain natural affinity between judging and administration, or that judging is normally one of the functions of ruling elites or simply "big men." The extended discussion of appeal tends to emphasize further the elite element. Therefore it might be well to conclude this discussions of courts with some discussion of the popular element in judging. It is doubtful, however, that very many societies experienced much pure popular judging. The Greek jury and its Roman derivative, chosen by lot under procedures that ensured the representation of all the generic components of the society, probably came the closest in form to complete democracy. But these juries typically operated in highly politicized contexts, subject to constraints and manipulations that reflected a far from democratic basic political structure. They may have represented a popular element in Greek and Roman governance, but they are far from a pure form of judging by the people.

The folkmoot, in which judgment is theoretically rendered by the whole people, is encountered in a number of societies. Whatever patterns of social and political hierarchy existed in the society at large no doubt were reflected at the moot as well. The folkmoot is often said to be the basic judicial institution of the ancient Germanic tribes and thus of the Anglo-Saxons. There are Roman reports of such moots in the forests of Germany. Apparently they were periodic meetings of the whole tribe in which all sorts of tribal decisions, including judicial ones, were made by acclamation. As we shall see in chapter 2, there is no actual evidence that the Anglo-Saxons ever held moots. The first English courts we know of have a popular element that is often said to derive from the moot, but may have other origins. Far more common than the moot as such is judging by the chief or the chief and his advisors, or the elders, *surrounded by* a participant audience of the people. This form of popular participation is not limited to tribal societies. As we shall see in chapter 4, imperial Chinese judges were required to hold open trials and attend to the sentiments of the audience. Probably the German moot was really of this sort. The audience may participate in a number of ways. First, it may be an important channel of fact-finding. Either individually or collectively, and by specific testimony or general demeanor, the people may convey to the judges information on specific facts, local customs and usages, and on the good character of litigants and witnesses. Second, they may provide important levels of judicial enforcement. Their presence may be a strong incentive to the litigants to behave properly before the courts. They will remember its judgment when the losing litigant seeks to forget it. And they may provide social pressure toward obedience to the court's decree. Most important, they are likely to provide strong pressure toward consensual behavior, superficial or real, on the part of the litigants. Even when judges cannot arrive at a mediatory settlement, truly satisfying both parties, the presence of the people may elicit a "good citizen" or "good sport" consent from the loser. Subsequently, the people may hold him to that consent on pain of loss of his moral reputation. Third, the popular audience may serve as the receptacle for the received legal tradition or a sounding board for the invention of new legal rules. In practice no distinction is likely to be made between traditional and new rules—the judges simply make trial enunciations of the "law" and see how they play to the audience. Finally, by its participation, the audience attests to the legitimacy of the judges—that they are perceived as holding judicial office. Popular participation links the court to the affective and effective world of local affairs, a particularly important function if the judges are themselves envoys from a distant central regime.

The popular element in English and Western European legal traditions that we have really substantial evidence for is the suitors' court. The English hundred, shire, and manor courts of this sort will be described in chapter 2. Where such courts exist, all persons of a certain social status, usually adult free men, are obliged to attend periodic sessions of their court. These "suitors" are the judges who hear cases and render verdicts, although some outside official may preside. While in theory all those qualified to be suitors must attend, in reality attendence was such a burden that the poorest suitors were not required to do so and the best off evaded their responsibilities. It is probable that most suitors' courts actually consisted of a relatively small share of the total body of locals who were theoretically "court-worthy." They would tend to be of the most respectable, middling sort. The larger the territory covered by the court, the greater the expense of travelling to and attending its meetings. So suitors' courts of more than very local jurisdiction would tend to be courts of gentry or notables.

Suitors' courts are found as local, feudal, and national institutions. Sometimes there was a purely local, customary obligation to attend a traditional local meeting. Sometimes there was an obligation on the part of subjects to attend their king's courts, and sometimes there was an obligation on the part of a vassal to attend his lord's courts. The presiding officer might be a local notable selected by the suitors themselves, a royal officer, the lord's bailiff, or indeed the lord himself. Typically, the suitors would apply local, customary law since as laymen they would know no other. Suitors' courts might be truly popular in the sense of reflecting local popular understanding of law. Or they might be popular facades behind which the king or lord worked his will by intimidating the suitors.

The origins of the English jury are obscure. What we do know is that such juries were at first a coercive device imposed on the people by a central regime bent on increasing its control over the countryside. The English kings required that a certain number of persons in each locale come together periodically to report to a king's officer which of the king's laws lately had been broken by which of the local residents. This was the grand jury. The jury thus began as a form of collective responsibility for reporting crime. Such systems are encountered in many societies as a form of "popular participation" that the people rarely care for very much. Both in medieval England and in imperial China, for instance, we encounter systems in which every ten or hundred or thousand persons or families, or every village, is collectively responsible for reporting criminals and vagabonds and whatever crimes they have committed to the central authorities. They may be punished for failure to discover and report crime or render up the criminal. As we shall see in chapter 2, the petit or trial jury first arose not to judge but to testify to certain facts which the king's judges needed to know in order to enforce royal legislation.

By the nineteenth century, the notion of the jury as a popular safeguard against the possible tyranny of royal prosecutors and judges was common in England. For instance the only basic "constitutional" protection of free speech in England to this day is Fox's Libel Act. It is a parliamentary statute requiring that prosecutions for "seditious libel," that is, criticism of the government, be heard by a jury. The introduction of both grand and petit juries in the United States was a result of this English experience. Yet it can be argued that, in reality, the grand jury has retained much of its original nature as an arm of government policy rather than a protection against it. Indeed, the grand jury has long since been abandoned in England and has been much criticized in the United States.

The petit jury, or something like it, has been introduced for criminal trials in many European countries. Sometimes, as in France, an actual jury is used with roughly the same role as an English or American jury. Often, however, European nations inject "lay assessors" instead of juries. Unlike the practice in the English-speaking world, Continental trial courts are usually presided over by a panel of judges rather than a single one. Thus, instead of using a jury, a popular element may be introduced by providing that one or more of the judges be laymen rather than professional judges.

This introduction of an essentially foreign element into Continental jurisprudence has resulted, as we shall see in chapter 2, in a rather uneasy court structure in most European countries. It is never quite possible to integrate criminal court proceedings fully into a unified court structure. The popular element introduced for criminal judging does not fit into the basic tradition of a professional judicial bureaucracy that dominates the judicial system as a whole.

Imperial powers sometimes employ mixed panels of metropolitan and native judges, in part to provide some element of local participation in government and in part to provide expertise on native law. Whenever a central legal system is attempting to absorb or make use of local, idiosyncratic, or specialized bodies of laws, customs, usages, or technologies, it may add representatives of the specialized communities to the regular judicial staff. Thus medieval courts both in England and on the Continent sometimes employed panels of merchants or craftsmen to assist in commercial and technological litigation. The privileged position of expert witnesses to offer the court "opinion" evidence is a similar device. Most witnesses may testify only to what they have personally seen or heard, but experts may give their opinions about matters within their particular expertise. The alternative is extraterritoriality or other forms of judicial enclaves, in which mer-

chants, tribesmen, town dwellers, men of the sea, religious sects, and the like are allowed special courts partially or wholly divorced from the general judicial system.

In all these instances the need for special factual and/or legal expertise and the need to increase the legitimacy and penetrating power of the courts in resistant enclaves can be met simultaneously by provisions for community participation. Such participation, however, runs partially against the capacity of the court system to wed local elements to a central regime. It is often an intermediate stage that tends either to disappear as the national government becomes stronger or to be transmitted into a general democratic safeguard as the jury is in England.

A similar set of dynamics is encountered in the use of lay as opposed to professional judges.[75] The distinction only superficially rests on the absence or presence of formal legal training. Its real significance is in the relative independence from or incorporation into a government personnel system with its capacity for disciplining subordinates. The English justice of the peace system, the American use of nonlawyers as local magistrates, and the encouragement or toleration of village elder courts by many governments ruling over peasant populations are major examples of lay judging. Such courts provide a cheap means of thrusting law down into the local communities. The countryside rather than the regime pays the lion's share of the costs of the administration of justice, usually in the form of unpaid or low-paid time devoted to judging by local, prominent men. Against the cheapness of this device must be balanced the reduced capacity of the regime to control such judges as opposed to professional local judges at the lowest step on a career ladder, who must look to the central authorities for promotion. Thus in some instances, most notably that of the English justices of the peace, the institution of lay judging may be a successful device for exploiting the pool of judicial and administrative skills in the countryside. In others, however, it may be part of a deliberate refusal or failure of a central regime to push its legal controls and services down into that countryside.

We noted earlier that the union of judging and administration was far more common than their separation. The English justices of the peace constitute such a union of lay judging and lay administration. As we shall see in chapter 2, the English experimented with various combinations of centralized and local judging and administration. Basically, they opted for a highly centralized professional judiciary and bureaucracy. They supplemented it, however, by a system of local justices of the peace. These J.P.'s were typically local gentry, that is, landholders, who provided local law enforcement, administration of local government services and judging in minor criminal matters. Sitting in panels, as a court of quarter sessions, they

handled somewhat more important criminal cases. After the early decline of the grand jury, the J.P.'s served as "presenting" officers for more serious crimes, which involved a combination of indicting and prosecuting. For centuries, quarter sessions was the basic instrument of local administration. Only late in the nineteenth century did the J.P.'s begin to lose much of their authority, both judicial and administrative. They long constituted one of the great institutional successes of British politics, but they were deemed successful largely because they were the faithful servants of the central government. They brought only a slight leavening of popular or lay participation to that government.

As we noted earlier, the other side of the coin of the capacity to control professional judges by controlling their career patterns may be the resistance of a professional judicial corps to government policies contrary to its conception of law and justice. One variant of lay judging, the "people's courts" of communist regimes, seems specifically designed to deal with this problem. As with many other communist institutions, this one varies markedly between the revolutionary stage and the stage of consolidation of the new regime. During the revolution, people's courts were little more than the borrowing of a familiar, legitimate form through which to identify local noncommunist populations with the destruction of the class enemy. Such courts require the people, as an egalitarian mass under the leadership of communist cadres, to participate directly in the murders and expropriations of the landlords and capitalists and to share in the distribution of the spoils. The people's courts serve as an integral part of the revolutionary process itself. Their ritualized violence breaks old social structures and loyalties, brings to the fore the most violent, malicious, and alienated, and openly fastens responsibility for revolutionary acts on the participants.

Once a communist regime is established, people's courts tend to split into three streams. The first, which confusingly often retains the official name "people's court," is in actuality a regular, professionally staffed, court system. In the Soviet Union, and throughout Eastern Europe, whatever the claims made, this regular court system is clearly identifiable in the education of its personnel, career patterns, procedures, and concept of judicial role with the preceding Roman law tradition. Indeed, these people's courts can be considered as simply the Eastern European branch of the family of Continental, civil law courts we will survey in chapter 3. While quite obviously much of the law they administer, particularly in the area of property, is not civil or Roman but communist law, their style and indeed much of their legal thinking is still within the Roman law tradition.

Of course, there are differences of degree. The Polish courts and law are most openly Roman law. The Soviet courts seek to stress their class

character by such touches as the wearing of street clothes on the bench. By law Soviet judges are popularly elected and serve only limited terms. In reality there is a professional, civil service judiciary quite similar to that in Western Europe. Soviet trial courts generally employ a panel of two lay assessors and one professional judge to emphasize their popular character. Nevertheless professional, legally expert judges and procurators—that is, government attorneys—tend to dominate the regular judicial system. Almost all judges in the Soviet Union are members of the party. In this way the regime insures that even a professional judiciary "independent and subordinate only to law," as the Soviet constitution and judicial statutes put it, is properly in tune with the goals and values of the communist government.[76]

The second stream is a large variety of "comradely courts," block committees, tenants councils, factory committees, and so on. These are genuine peoples' courts in the sense that they are gatherings of the people who live on a certain street or in a certain building or work in a certain place. Generally they confine themselves to the mediation of minor quarrels that arise between neighbors or fellow workers, or within families, guided by their sense of "socialist justice."[77]

The comradely courts have had their ups and downs in communist states, becoming more prominent when regimes have sought to stress revolutionary fervor and less so when the regimes have been emphasizing stability and "socialist legality." At those times when a communist regime has sought to return to full revolutionary status, as during the "Cultural Revolution" in China, the comradely or real peoples' courts may return to their origins as instruments of class violence and terror. So, at one extreme, these popular courts may be lynch mobs and, at the other, approach pure mediation.

These two extremes also mark the third judicial stream of communist states. The stream is composed of a series of special tribunals. At one extreme they include the tribunals of the secret police, which during periods of terror secretly consign people to death or the labor camps without inconvenient legal formalities. At the other extreme are arbitration tribunals which arbitrate disputes between state-owned industrial units that arise under the contracts they enter into with one another. Such arbitration is sometimes binding, but sometimes consists of mediation which may be followed by a suit in a regular court should the mediation fail.

At the times of their initial revolutions, communist regimes saw that professional courts of law would necessarily be courts staffed by prerevolutionary judges applying prerevolutionary law. They turned to peoples' courts precisely because they did not want the prototypic court with an independent judge applying preexisting legal rules. Indeed Soviet and Chinese communist regimes at first urged their peoples' judges to make liberal use of analogy to make new law in every case in which it was necessary to do so to punish the class enemy. While the Chinese persisted in this approach, most communist regimes retain only remnants of it. For they have discovered that an "independent" judiciary applying "preexisting legal rules" is no threat to the workers' state so long as certain conditions are met. The judges must be party members subject to party discipline. They must also be subject to the career discipline of the judicial bureaucracy. And the legal rules must be those made by the regime. Thus the peoples' courts of the first stream we described are popular courts only to the extent one subscribes to the claim that communist regimes are popular regimes.

No doubt peoples' courts have certain ideological advantages and are particularly appropriate to the system of massive mutual surveillance encouraged by communist regimes. Modern noncommunist societies, however, have also proliferated small claims courts, domestic relations and juvenile tribunals, industrial and commercial arbitration panels, housing courts, counseling services, and administrative boards that handle a great deal of conflict resolution and social control through quasi-judicial proceedings but without professional judges or outside of the normal forms of litigation. Peoples' courts, often in conjunction with peoples' "militia," can perform many similar functions.

CONCLUSION

If we ground our notion of courts in the triadic structure of conflict resolution, a wide range of social phenomena are courtlike, many of which are not specifically political unless we choose to label all situations of conflict political. However, once we encounter the substitution of judicial office and law for spontaneous consent, the intermix of conflict resolution, social control, and lawmaking in most courts, and the frequent integration of judging with administrative or general political authority, a substantial share of courts and judges seems to be engaging in politics. Like most other major political institutions, courts tend to be loaded with multiple political functions, ranging under various circumstances from bolstering the legitimacy of the political regime to allocating scarce economic resources or setting major social policies.

In the succeeding chapters of this book, we shall examine the courts of England, Western Europe, imperial China, and Islam, in each instance attempting to relate them to the political regimes of which they form a part. In the process a great many of the points made in this chapter will be amplified and illustrated. Each chapter picks up a central theme introduced in this one. In each instance I have chosen those comparative and historical

materials that seemed best suited to falsify the propositions I have advanced. Thus my suspicions about the notion of judicial independence have been placed against the background of the judicial system that is generally regarded as the most independent—the English. My questioning of the prototype's insistence on preexisting legal rules has been put in the context of that legal system which is commonly supposed to best exemplify the subordination of the judge to statutory law—the code law systems of Western Europe. My insistence on the inevitable mixture of judging and mediation is tested against the legal system most often reputed to be totally dominated by mediation—that of imperial China. My argument that appeal is universal because of its political utility is pursued in relation to the one major legal system that does not generally employ appeal—that of traditional Islam.

2 ENGLISH COURTS AND JUDICIAL INDEPENDENCE

Introduction

In chapter 1 we traced the substitution of office and law for consent that characterizes at least a segment of most developed legal systems. A judicial official chosen by government is substituted for the selection of the triadic figure by the two conflicting parties themselves. As a result the losing party can no longer be persuaded that the trial did not break down into two against one by reminding him that he himself chose the third person. Consequently, the legal system will find it useful to endow the third party with some special attributes designed to content the loser.

In this sense the notion of an "independent judiciary," which is central to the conventional prototype of courts, is simply an elaborate rationalization for the substitution of coercion for consent. The state now imposes a judge on the parties. The judge is openly and admittedly a state official. It is repeatedly asserted, nonetheless, that he is "independent." The myth of judicial independence is designed to mollify the loser. He is told that he must not view the triad as two against one because, by the very nature of judicial office, the third person is neutral and independent of both the parties and debarred from forming a coalition with either one.

The functional utility of the myth of judicial independence is so great that we find it widespread among the various past and present legal systems of the world. It is particularly associated, however, with the evolution of Anglo-American judiciaries. It is also an important element in Continental jurisprudence, but assertions of judicial independence have never been as clear or simple-minded there as they have been in the English-speaking world. Particularly among American and English authorities, "judicial independence" has been less a rigorously defined concept than a generalization of Anglo-American experience.[1] Consequently an examination of the actual institutional development of Anglo-American courts should tell us a good deal about the reality of that judicial independence which is one of the four essential features of the conventional prototype of a court.

Judicial Independence and Political Centralization

Before turning to the details of the British data, some preliminary definitional remarks are in order. We are not going to discover that there is