

The Forms and Limits of Adjudication

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# THE FORMS AND LIMITS OF ADJUDICATION

Lon L. Fuller\*

*Special Editor's Note*

*The initial version of The Forms and Limits of Adjudication was circulated to the members of the Legal Philosophy Discussion Group at Harvard Law School in 1957. A revised and expanded version was prepared in 1959 for use in Mr. Fuller's course in Jurisprudence and for discussion at the Round Table on Jurisprudence at the 1959 meeting of the Association of American Law Schools. Further refinements resulted in a third version for classroom use in 1961; I have followed that version here.*

*The editing has consisted principally of minor grammatical corrections and changes of punctuation; the addition of several paragraphs in Part VI, section 2 (see note 22); and the identification, where possible, of important references and sources, which are inserted in brackets. I am deeply grateful to Mrs. Marjorie Fuller, who made it possible for me to examine the library and private papers of her late husband.*

*The complete essay has never before been published, but portions of it were included in two articles by Mr. Fuller: Adjudication and the Rule of Law, 54 PROC. AM. SOC'Y INT'L L. 1 (1960) and Collective Bargaining and the Arbitrator, 1963 WIS. L. REV. 3. Mr. Fuller also granted permission for the printing of a substantial part of the essay in AMERICAN COURT SYSTEMS: READINGS IN JUDICIAL PROCESS AND BEHAVIOR (S. Goldman & A. Sarat eds. 1978). That Mr. Fuller never published the entire essay is due, I believe, to a plan he formulated in 1958 or 1959 to expand it into a book of the same title. By 1960 the projected volume had become The Principles of Social Order, an essay in economics—that is, in Mr. Fuller's words, "the theory of good order and workable arrangements." Though Mr. Fuller was subsequently diverted from this project, it embodied what one can see retrospectively was the central preoccupation of his writings during the 1960's and early 1970's.*

*Kenneth I Winston \*\**

## I. THE PROBLEMS TOWARD WHICH THIS ESSAY IS ADDRESSED

**T**HE subject matter of this essay is adjudication in the very broadest sense. As the term is used here it includes a father attempting to assume the role of judge in a dispute between his children over possession of a toy. At the other extreme it embraces the most formal and even awesome exercises of adjudicative power: a Senate trying the impeachment of a President, a Supreme Court sitting in judgment on the powers of the govern-

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ment of which it is a part, an international tribunal deciding a dispute between nations, a faculty of law — in former centuries — undertaking to judge the rival claims of kings and popes, the Congregation of Rites of the Roman Catholic Church hearing the arguments pro and con in a procedure for canonization.

As the term adjudication is used here its application is not restricted to tribunals functioning as part of an established government. It includes adjudicative bodies which owe their powers to the consent of the litigants expressed in an agreement of submission, as in labor relations and in international law. It also includes tribunals that assume adjudicative powers without the sanction either of consent or of superior governmental power, the most notable example being the court that sat in the Nuremberg Trials.

The problems that are the concern of this paper are those suggested by the two terms of the title, the *forms* and *limits* of adjudication. By speaking of the *limits* of adjudication I mean to raise such questions as the following: What kinds of social tasks can properly be assigned to courts and other adjudicative agencies? What are the lines of division that separate such tasks from those that require an exercise of executive power or that must be entrusted to planning boards or public corporations? What tacit assumptions underlie the conviction that certain problems are inherently unsuited for adjudicative disposition and should be left to the legislature? More generally, to borrow the title of a famous article by Roscoe Pound, what are the limits of effective legal action?<sup>1</sup> — bearing in mind that legislative determinations often can only become effective if they are of such a nature that they are suited for judicial interpretation and enforcement.

By the *forms* of adjudication I refer to the ways in which adjudication may be organized and conducted. For example, in labor relations and in international law we encounter a hybrid form called "tripartite arbitration" in which a "public" or "impartial" arbitrator sits flanked by arbitrators appointed by the interested parties. Such a deviation from the ordinary organization of adjudication presents such questions as: What, if any, are its proper uses? What are its peculiar limits and dangers? Other deviational forms present less subtle questions, such as Judge Bridlegoose's decisions by a throw of the dice.<sup>2</sup> In general the questions posed for consideration are: What are the permissible variations in the forms of adjudication? When has its nature

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<sup>1</sup> [Pound, *The Limits of Effective Legal Action*, 3 A.B.A.J. 55 (1917).]

<sup>2</sup> [3 F. RABELAIS, *THE HISTORIES OF GARGANTUA AND PANTAGRUEL* ch. 39 (J.M. Cohen trans. 1955).]

been so altered that we are compelled to speak of an "abuse" or a "perversion" of the adjudicative process?

Questions of the permissible forms and the proper limits of adjudication have probably been under discussion ever since something equivalent to a judicial power first emerged in primitive society. In our own history the Supreme Court at an early date excluded from its jurisdiction certain issues designated as "political." This exclusion could hardly be said to rest on any principle made explicit in the Constitution; it was grounded rather in a conviction that certain problems by their intrinsic nature fall beyond the proper limits of adjudication, though how these problems are to be defined remains even today a subject for debate. In international law one of the most significant issues lies in the concept of "justiciability." Similar problems recur in labor relations, where the proper role of the arbitrator has always been a matter in active dispute.

It is in the field of administrative law that the issues dealt with in this paper become most acute. An official charged with allocating television channels wants to know of one applicant "what kind of fellow he really is" and accepts an invitation to a leisurely chat over the luncheon table. The fact of this meeting is disclosed by a crusading legislator. The official is accused of an abuse of judicial office. Charges and countercharges fill the air and before the debate is over it appears that nearly everyone concerned with the agency's functioning has in some measure violated the proprieties that attach to a discharge of judicial functions. In the midst of this murky argument few are curious enough to ask whether the tasks assigned to such agencies as the Federal Communications Commission (FCC) and the Civil Aeronautics Board (CAB) are really suited for adjudicative determination, whether, in other words, they fall within the proper limits of adjudication. No one seems inclined to take up the line of thought suggested by a remark of James M. Landis to the effect that the CAB is charged with what is essentially a managerial job, unsuited to adjudicative determination or to judicial review.<sup>3</sup>

The purpose of this Article is to offer an analysis that may be helpful in answering questions like those posed in the preceding paragraphs. Now it is apparent that any analysis of this sort, transcending as it does so many conventional boundaries, will be meaningless if it does not rest on some concept equivalent to "true adjudication." For if there is no such thing as "true adjudica-

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<sup>3</sup> [See J.M. Landis, Report on Regulatory Agencies to the President-Elect 41-45 (December 1960), *reprinted in* SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE, SENATE COMM. ON THE JUDICIARY, 81ST CONG., 2D SESS., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 41-45 (Comm. Print 1960).]

tion," then it becomes impossible to distinguish the uses and abuses of adjudication. Yet it is unfortunately also true that any suggestion of a notion like "true adjudication" goes heavily against the grain of modern thought. Today it is a mark of intellectual liberation to realize that there is and can be no such thing as "true science," "true religion," "true education," or "true adjudication." "It is all a matter of definition." The modern professional university philosopher is particularly allergic to anything suggesting the doctrine of essence and takes it as a sure sign of philosophic illiteracy when a writer speaks of "the essence of art" or "the essence of democracy."

Yet we must examine critically the implications of this rejection. Does it imply, for example, that international lawyers are talking nonsense when they discuss the question of what kinds of disputes between nations are suited to decision by a tribunal? Are students of labor relations engaged in mere verbal shadow-boxing when they ask how an arbitration should be conducted and what sorts of questions arbitrators are fitted to decide? Do those engaged in discussions of this sort deceive themselves in believing that they are engaged in a rational inquiry? Surely if adjudication is subject to a reasoned analysis in a particular context, there is no a priori reason for supposing that the context cannot be expanded so that adjudication becomes the object of a more general analysis.

A.D. Lindsay once observed that it is scarcely possible to talk intelligently about social institutions without recognizing that they exist *because* and *insofar as* men pursue certain goals or ideals.<sup>4</sup> The ideals that keep a social institution alive and functioning are never perceived with complete clarity, so that even if there is no failure of good intentions, the existent institution will never be quite what it might have been had it been supported by a clearer insight into its guiding principles. As Lindsay remarks, quoting Charley Lomax in Shaw's *Major Barbara*, there is a certain amount of tosh about the Salvation Army. Surely there is a good deal of tosh — that is, superfluous rituals, rules of procedure without clear purpose, needless precautions preserved through habit — in the adjudicative process as we observe it in this country. Our task is to separate the tosh from the essential. If in undertaking that task we go counter to a deeply held modern belief that there is nothing about society or about man's relations to his fellows that is essential and that all is in effect tosh, this is a price we shall have to pay to accomplish our objective. Certainly there is nothing commendable in a procedure that avoids having to pay that price by keeping the discussion on a speciously

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<sup>4</sup> [A.D. LINDSAY, I THE MODERN DEMOCRATIC STATE 42 (1943).]

ad hoc plane, where its broader implications raise no questions because they are not perceived.

Accordingly I shall have to begin our inquiry with an attempt to define "true adjudication," or adjudication as it might be if the ideals that support it were fully realized. In doing so I shall of necessity be describing something that never fully exists. Yet it is only with the aid of this nonexistent model that we can pass intelligent judgment on the accomplishments of adjudication as it actually is. Indeed, it is only with the aid of that model that we can distinguish adjudication as an existent institution from other social institutions and procedures by which decisions may be reached.

## II. THE TWO BASIC FORMS OF SOCIAL ORDERING

It is customary to think of adjudication as a means of settling disputes or controversies. This is, of course, its most obvious aspect. The normal occasion for a resort to adjudication is when parties are at odds with one another, often to such a degree that a breach of social order is threatened.

More fundamentally, however, adjudication should be viewed as a form of social ordering, as a way in which the relations of men to one another are governed and regulated. Even in the absence of any formalized doctrine of *stare decisis* or *res judicata*, an adjudicative determination will normally enter in some degree into the litigants' future relations and into the future relations of other parties who see themselves as possible litigants before the same tribunal. Even if there is no statement by the tribunal of the reasons for its decision, some reason will be perceived or guessed at, and the parties will tend to govern their conduct accordingly.

If, then, adjudication is a form of social ordering, to understand it fully we must view it in its relation to other forms of social ordering. It is submitted that there are two basic forms of social ordering: *organization by common aims* and *organization by reciprocity*. Without one or the other of these nothing resembling a society can exist.

These two forms of ordering represent the two basic ways in which men may, by coming together, secure an advantage for all participants. We may illustrate these forms very simply by assuming, first, that two men share an objective which neither could achieve without the aid of the other or could not achieve so easily without that aid. A roadway connects two farms with a highway; it becomes blocked by a boulder. Neither farmer is strong enough to remove the boulder by himself. When the two

join forces to remove the boulder we have, obviously, organization or association by common aims. Now let us suppose that our two farmers are to a considerable extent engaged in "subsistence" farming. One of them has a large crop of onions, the other an abundance of potatoes. A trade of a portion of their respective crops may make each richer; to the potato-raising farmer the "last" potato is not so valuable as the "first" onion, and, of course, a surfeit of onions will put the other farmer in the reverse position. Here we have illustrated in its crassest and most obvious form organization or association by reciprocity.

It should be noticed that the conditions which make these two principles of ordering effective are directly opposite to one another. To make organization by reciprocity effective the participants must want different things; organization by common aims requires that the participants want the same thing or things.

In order to bring these forms of ordering into closer relation with adjudication let us now consider briefly *their forms* and *limits*. With respect to reciprocity the form of the relationship may run all the way from a tacit perception of the advantages of an association, scarcely rising to consciousness, to a highly formalized written contract or treaty. Two men find pleasure in one another's company without realizing that the source of that pleasure lies in the fact that they have complementary qualities, so that each needs what the other has to give. There are probably few marriages in which the relations of the spouses are not to some degree organized or directed by the principle of reciprocity. There may, however, be an understandable reluctance to give explicit recognition to this principle, and the acknowledged basis of the relationship may be something closer to a fiction that all aims are shared aims. This may, indeed, be a beneficent fiction; not all the tosh in human relations is harmful. At any rate, whatever reciprocity may underlie any particular marriage, it illustrates the principle of reciprocity in one of its most tacit and informal expressions. At the other end of the scale we might instance a collective labor agreement, every sentence of which was the result of prolonged and explicit bargaining.

Association by common aims also varies over a wide range in the degree of its formality. At the one end of the spectrum, we have the small group, its members all actively sharing and all understanding the same objectives. Such is the case of our farmers uniting to remove a roadblock. At an intermediate point on the scale of formality, we have the voluntary association, the political party, the labor union, and the benevolent society. Here some general aims will commonly be shared actively by most intelligent members; other aims will be promulgated by the leaders which

will not in any real sense be shared or even understood by most members; finally, some aims will be pursued by the leaders in the name of the association that will not even be known outside a small circle. In considering this constellation of objectives, it should not be forgotten that it is, in the long run, the actively shared and at least vaguely understood aims that give the association its motive power. Ascending farther along the scale of increasing formality, we finally encounter the nation or the state. Here we have what may be truly called an involuntary association, in the sense that there is no readily available procedure by which the member may resign or effectively disclaim his membership. At the same time he is bound by rules enacted to secure certain objectives whether or not he approves of these objectives or even understands them. The extent to which he and other citizens actively share the objectives pursued by their government is something that varies from nation to nation and over time within a given nation. In times of war the area of actively shared aims normally expands greatly. At other times the area of shared aims may shrink to the point where it embraces merely the negative object of avoiding the disruptions of revolution, of preserving an unsatisfactory status quo. It is possible, in extreme cases, that even this impoverished objective may be shared only by a minority of the citizens, sufficiently organized to impose their will on the majority. At the same time, it is important to recall that without some actual sharing of aims affirmatively entertained, however impoverished the aims and however restricted the sharing, no government is possible. It is for that reason that a government is here considered as a highly formalized variety of organization by common aims.

With respect to the *limits* or the proper provinces of the two basic forms of social ordering, what has just been said sufficiently disposes of organization by common aims. In the case of organization by reciprocity it is obvious that it properly comes into play where an exchange, or something equivalent to it, may enrich both parties. Its proper province lies in that area where divergent human objectives exist. This simple truth is obscured in our complex society, where men and organizations deliberately specialize in order to prepare themselves to enter into relations of reciprocity, as in the case of a factory that expands its earnings and restricts its market by making a highly specialized component part. It may seem silly to say that the sale of a loaf of bread presents a case of "divergent objectives" in the sense that I want the bread more than the twenty cents I pay for it, while the grocer wants my twenty cents more than he wants the bread. Yet the transaction makes no sense in any other terms. Any paradox

involved is simply the general one that we cannot truly understand routinized and habitual actions in terms of the actual psychological states that accompany their performance.

The last observation suggests a more general criticism that may be directed against the whole analysis being presented here, namely that it grossly overstates the role of rational calculation in human affairs. It forgets that men often act in blind conformity to custom, in passive acquiescence to authority, and — sometimes at least — in response to inarticulate impulses of altruism. But there is no intention here to deny that the springs of human actions are diverse and often obscure.

What is being assumed in this analysis is not that human beings at all times behave rationally but that it is the rational core of human institutions that is alone capable of keeping those institutions viable and sound, that can preserve them from deterioration, that can get them back on course after they have temporarily lost their bearings. In general what I have called the tosh is something that must be gauged and identified on an ad hoc basis. It is usually determined by some local context, some particular conjunction of historical forces, some special accommodation of opposing interests. If we wish to judge truly any social institution in its particular setting, we must take this accretion of tosh into account. Many well-intentioned reforms have failed because they neglected to do this. But to elevate the tosh to the point of treating it as the basic source of social order is to abandon any hope of fruitful analysis.

I have spoken of the tosh that accumulates about institutions as something that develops out of some local and nonrecurring combination of circumstances — as a phenomenon, in other words, that follows no general laws. It may be that this is an overstatement. It may be possible to predict within given limits that under certain circumstances, or at a given stage of development, an institution will acquire a particular kind of tosh. If this is so, then the thesis of this paper may require some modification. But the possibility that some such modification may turn out to be necessary is surely not of itself a reason for abandoning all effort to analyze the rational elements that inhere in social organization.

In attempting to extract the “rational core” that gives direction and constancy to our institutions, we should be on the lookout for a tacit assumption that equates rational behavior with the calculating advancement of self and views all that is noble in human nature as essentially irrational. This assumption is apt to become particularly operative when a comparison is made between what I have called the two basic forms of social ordering. The principle of reciprocity — as symbolized in its crassest form, the

economic trade or "deal" — is considered as a manifestation of human nature in its most selfish, calculating mood. Man is seen as being wholly good when he ceases to calculate, when he surrenders to aims larger than himself which he does not wholly understand — when, in other words, his relations with his fellows are wholly dominated by the principle of common or "social" aims.

This is, I think, a dangerous view of human nature and of the principles that determine a sound organization of man's relations with his fellows. In the first place, a relation of reciprocity may be entered for altruistic reasons. For example, two men enter a contract for the construction of an orphan asylum. The man for whom the asylum is being built is a man of means who desires to put all of his wealth into a home for orphaned children. The contractor enters the same agreement in order to secure funds to put a gifted nephew through college. Both view themselves, surely with some reason, as acting to advance the interests of others, though their relation is one of reciprocity.

Second, no social organization can be good that is grossly inefficient. At the present time in the communist countries, particularly in Poland and Russia, there is an active interest in "rationalizing" the pricing of goods and the computation of costs. It is plain that this requires a type of economic organization that embraces the market principle, in which the units of industry organize their relations with one another by the principle of reciprocity. It may sometimes be convenient to a dictator to have at his command compliant subjects who have lost the habit of calculation. But if he wishes to express his own benevolence (or even his malevolence) toward society effectively, he has to know what he is doing and that he cannot do without some method of measuring economic costs. This means in turn that at least the higher echelons of those concerned with economic activity must organize their relations by the principle of reciprocity.

Third — and this is the most fundamental point — we must look more closely to see just what facets of human nature the two basic forms of ordering do in fact bring to the fore. It is, of course, true that in a relation of reciprocity each party is expected to stand up for himself; indeed, this is required if the full advantages of this form of association are to be obtained. At the same time, it must be realized that this relationship requires of each party that he understand as fully as he possibly can what the other party is like and what his wants are. In an organization dominated by the principle of common ends, nothing is easier than to slip into the assumption that the other fellow wants what we want, or that he will want the same thing when his perception

has developed to the level of our own. There is no automatic corrective for this kind of error, which is probably as common as any that men are subject to.

In a relation of reciprocity, however, we must know, if we are to obtain what we want, what the other fellow wants. It is true that, like Tom Sawyer when he got himself out of a fence-painting job, we may persuade the other fellow he wants something that he really does not, or like the modern advertiser we may elevate this persuasion to the level of a skillful manipulation of mass opinion. But even in this manipulation there is latent a certain regard for human dignity; we at least try to make the fellow over so that *he* will want what we have to give him. We do not merely thrust something on him and say, "Here it is." The now-repudiated Soviet legal philosopher Pashukanis discerned the quintessence of capitalist morality in the ethical principle proclaimed by Kant, that we should treat our fellow man as an end-in-himself and never as a mere means. Pashukanis argued that it is only in a society dominated by the principle of exchange that such a precept could be attractive or even workable.<sup>5</sup> In a society shaped by the principle of common aims all men would be means for society and for one another; no man would be treated as an end-in-himself. In terms of Pashukanis' analysis the relationship of reciprocity may in fact be defined as one in which each participant is treated by the other as an end-in-himself.

In judging the relative faults and virtues of the two basic forms of social ordering — for each has both faults and virtues — it would be well to recall Jeremy Bentham's wry comment that if Eve's every act had been for Adam, and his for her, they would both have starved to death.<sup>6</sup> It should also be recalled that the two modern forms of totalitarianism have shared a contempt for "trading morality" and have pretended to direct every individual activity "for the good of all." Finally, it may be well to point out that the principle of reciprocity is implicit in the "golden rule."

These remarks may seem something of a digression from adjudication. But since the analysis presented in this paper discerns an intimate connection between adjudication and what I have called the two basic forms of social ordering, it was thought wise to forestall at the outset at least the more obvious misunderstandings that may be engendered in the course of the discussion. It is now time, however, to place adjudication in its proper relation to the two basic forms of social organization.

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<sup>5</sup> [See Fuller, *Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory*, 47 MICH. L. REV. 1157 (1949).]

<sup>6</sup> [See L. STEPHEN, 1 THE ENGLISH UTILITARIANS 312 (1900).]

### III. ADJUDICATION AS A FORM OF SOCIAL ORDERING

In discussing reciprocity and organization by common aims, I pointed out that these two forms of social ordering present themselves along a scale of varying formal explicitness. To some extent the same thing is true of adjudication. We talk, for example, of "taking our case to the forum of public opinion." Or two men may argue in the presence of a third with a kind of tacit hope that he will decide which is right, but without any explicit submission of their dispute to his arbitrament.

On the very informal level, however, forms of social ordering are too mixed and ambiguous to make comparisons fruitful. It is only when a particular form of ordering explicitly controls a relationship that it can be set off clearly against alternative forms of ordering. For this reason, therefore, I am here employing contract to represent reciprocity in its formal and explicit expression. I shall take elections as the most familiar formalization of organization by common aims.

Adjudication, contract, and elections are three ways of reaching decisions, of settling disputes, of defining men's relations to one another. Now I submit that the characteristic feature of each of these forms of social ordering lies in the manner in which the affected party participates in the decision reached. This may be presented graphically as follows:

<i>Form of Social Ordering</i>	<i>Mode of Participation by the Affected Party</i>
Contract	Negotiation
Elections	Voting
Adjudication	Presentation of proofs and reasoned arguments

It is characteristic of these three ways of ordering men's relations that though they are subject to variation — they present themselves in different "forms" — each contains certain intrinsic demands that must be met if it is to function properly. We may distinguish roughly between "optimum conditions," which would lift a particular form of order to its highest expression, and "essential conditions," without which the form of order ceases to function in any significant sense at all.

With respect to the principle of contract an analysis of optimum and essential conditions would be exceedingly complex and would require an analysis of the requirements of a market economy, of the peculiar qualities of bargaining in situations of

oligopoly, etc. We can observe, however, that a regime of contract presupposes the absence of certain kinds of coercion; a contract signed at the point of a gun is hardly in any significant sense a contract at all. However, it will be simpler if we confine our attention here to a comparison of elections with adjudication.

Elections present themselves in many forms, varying from the town meeting to the "ja-nein" plebiscite. Voting can be organized in many ways: simple majority vote, PR [proportional representation], STV [single transferable voting], and various complicated mixed forms.<sup>7</sup> At the same time all of these expressions of political democracy have in common that they afford the person affected by the decision which emerges a peculiar form of participation in that decision, namely, some form of voting. The optimum conditions that would give fullest meaning to this participation include an intelligent and fully informed electorate, an active interest by the electorate in the issues, candor in discussing those issues by those participating in public debate — conditions, it is needless to say, that are scarcely ever realized in practice. On the other hand, there are certain essential conditions without which the participation of the voter loses its meaning altogether. These would include that the votes be honestly counted, that the ballot boxes not be "stuffed," that certain types of intimidation be absent, etc.

Now much of this paper will be concerned in carrying through with a similiar analysis of the optimum and essential conditions for the functioning of adjudication. This whole analysis will derive from one simple proposition, namely, that the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor. Whatever heightens the significance of this participation lifts adjudication toward its optimum expression. Whatever destroys the meaning of that participation destroys the integrity of adjudication itself. Thus, participation through reasoned argument loses its meaning if the arbiter of the dispute is inaccessible to reason because he is insane, has been bribed, or is hopelessly prejudiced. The purpose of this paper is to trace out the somewhat less obvious implications of the proposition that the distinguishing feature of adjudication lies in the mode of participation which it accords to the party affected by the decision.

But first it will be necessary to deal with certain objections that may be raised against my starting point, namely against the

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<sup>7</sup> [See W.J.M. MACKENZIE, *FREE ELECTIONS: AN ELEMENTARY TEXTBOOK* (1958).]

proposition that the "essence" of adjudication lies in the mode of participation it accords to the affected party.

#### IV. ADJUDICATION AND RATIONALITY

It may be said that the essence of adjudication lies not in the manner in which the affected party participates in the decision but in the office of judge. If there is a judge and a chance to appear before him, it is a matter of indifference whether the litigant chooses to present proofs or reasoned arguments. He may, if he sees fit, offer no argument at all, or pitch his appeal entirely on an emotional level, or even indicate his willingness that the judge decide the case by a throw of the dice. It might seem, then, that our analysis should take as its point of departure the office of judge. From this office certain requirements might be deduced, for example, that of impartiality, since a judge to be "truly" such must be impartial. Then, as the next step, if he is to be impartial he must be willing to hear both sides, etc.

The trouble with this is that there are people who are called "judges" holding official positions and expected to be impartial who nevertheless do not participate in an adjudication in any sense directly relevant to the subject of this paper. Judges at an agricultural fair or an art exhibition may serve as examples. Again, a baseball umpire, though he is not called a judge, is expected to make impartial rulings. What distinguishes these functionaries is not that they do not hold governmental office, for the duties of a judge at a livestock fair would scarcely be changed if he were an official of the Department of Agriculture. What distinguishes them from courts, administrative tribunals, and boards of arbitration is that their decisions are not reached within an institutional framework that is intended to assure to the disputants an opportunity for the presentation of proofs and reasoned arguments. The judge of livestock may or may not permit such a presentation; it is not an integral part of his office to permit and to attend to it.

If, on the other hand, we start with the notion of a process of decision in which the affected party's participation consists in an opportunity to present proofs and reasoned arguments, the office of judge or arbitrator and the requirement of impartiality follow as necessary implications. The logician Frege once took the expression "I accuse" as exemplifying the complex implications contained in the most ordinary language. We may say that the verb "to accuse" presupposes five elements: (1) an accuser, (2) a person accused, (3) a person before whom the accusation is presented, (4) an act charged against the accused, and (5) a principle by

which the act may be condemned.<sup>8</sup> The similarity to the analysis here presented is apparent; the fifth element, it should be noted, corresponds to the notion of a *reasoned* argument. Of course, Frege was concerned merely to spell out the implications contained in a phrase, not, as we are here, with the problem of creating and maintaining a social institution that will give effect to those implications.

It may be objected at this point that "reasoned argument" is, after all, not a monopoly of forensic proceedings. A political speech may take the form of a reasoned appeal to the electorate; to be sure, it often takes other forms, but the same thing may be said of speeches in court. This objection fails to take account of a conception that underlies the whole analysis being presented here, the conception, namely, of a form of participating in a decision that is institutionally defined and assured.

When I am entering a contract with another person I may present proofs and arguments to him, but there is generally no formal assurance that I will be given this opportunity or that he will listen to my arguments if I make them. (Perhaps the only exception to this generalization lies in the somewhat anomalous legal obligation "to bargain in good faith" in labor relations.) During an election I may actively campaign for one side and may present what I consider to be "reasoned arguments" to the electorate. If I am an effective campaigner this participation in the decision ultimately reached may greatly outweigh in importance the casting of my own single vote. At the same time, it is only the latter form of participation that is the subject of an affirmative institutional guarantee. The protection accorded my right to present arguments to the electorate is almost entirely indirect and negative. The way will be held clear for me, but I shall have to pave it myself. Even if I am given an affirmative right (for example, under the "equal time" rule of the FCC) I am given no formal assurance that anyone will listen to my appeal. The voter who goes to sleep before his television set is surely not subject to the same condemnation as the judge who sleeps through the arguments of counsel.

Adjudication is, then, a device which gives formal and institutional expression to the influence of reasoned argument in human affairs. As such it assumes a burden of rationality not borne by any other form of social ordering. A decision which is the product of reasoned argument must be prepared itself to meet the test of

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<sup>8</sup> [This analysis is taken from an anonymous review of TRANSLATIONS FROM THE PHILOSOPHICAL WRITINGS OF GOTTLIB FREGE (P. Geach & M. Black eds. 1952) in 1952 THE TIMES (London) LITERARY SUPPLEMENT 553, col. 1. The reviewer offers the analysis to illustrate the notion of "functional expression." The fifth element has been added by Mr. Fuller.]

reason. We demand of an adjudicative decision a kind of rationality we do not expect of the results of contract or of voting. This higher responsibility toward rationality is at once the strength *and the weakness* of adjudication as a form of social ordering.

In entering contracts, men are of course in some measure guided by rational considerations. The subsistence farmer who has a surfeit of potatoes and only a handful of onions acts reasonably when he trades potatoes for onions. But there is no test of rationality that can be applied to the result of the trade considered in abstraction from the interests of the parties. Indeed, the trade of potatoes for onions, which is a rational act by one trader, might be considered irrational if indulged in by his opposite number, who has a storehouse full of onions and only a bushel of potatoes. If we asked one party to the contract, "Can you defend that contract?" he might answer, "Why, yes. It was good for me and it was good for him." If we then said, "But that is not what we meant. We meant, can you defend it on general grounds?" he might well reply that he did not know what we were talking about. Yet this is precisely the kind of question we normally direct toward the decision of a judge or arbitrator. The results that emerge from adjudication are subject, then, to a standard of rationality that is different from that imposed on the results of an exchange.

I believe that the same observation holds true when adjudication is compared with elections. The key to the difference lies again in the mode in which the affected party participates in a decision. If, as in adjudication, the only mode of participation consists in the opportunity to present proofs and arguments, the purpose of this participation is frustrated, and the whole proceeding becomes a farce, should the decision that emerges make no pretense whatever to rationality. The same cannot be said of the mode of participation called voting. We may assume that the preferences of voters are ultimately emotional, inarticulate, and not subject to rational defense. At the same time there is a need for social order, and it may be assumed that this need is best met when order rests on the broadest possible base of popular support. On this ground, a negative defense of democracy is possible; the will of the majority controls, not because it is right, but — well, because it *is* the will of the majority. This is surely an impoverished conception of democracy, but it expresses at least one ingredient of any philosophy of democracy, and it suggests a reason why we demand of adjudication a kind of rationality that we do not expect of elections.

This problem can be approached somewhat obliquely from a different direction by asking what is implied by "a right" or by "a claim of right." If I say to someone, "Give me that!" I do not

necessarily assert a right. I may be begging for an act of charity, or I may be threatening to take by force something to which I admittedly have no right. On the other hand, if I say, "Give that to me, I have a right to it," I necessarily assert the existence of some principle or standard by which my "right" can be tested.

To be sure, this principle or standard may not have antedated my claim. If one boy says to another, "Give me that catcher's mitt," and answers the question, "Why?" by saying, "Because I am the best catcher on the team," he asserts a principle by which the equipment of the team ought to be apportioned in accordance with the ability to use it. He necessarily implies that, were the respective abilities of the two boys reversed, the mitt should remain where it is. But he does not, by necessary implication, assert that the principle by which he supports his claim is an established one. Indeed, up to the time this claim is made, the right to be catcher might depend not on ability but on ownership of the catcher's mitt. In that event the claim based upon the new principle of ability might, in effect, propose a revolution in the organization of the team. At the same time, this claim does necessarily imply a principle which can give meaning to the demand that like cases be given like treatment.

Now if we ask ourselves what kinds of questions are commonly decided by judges and arbitrators, the answer may well be, "Claims of right." Indeed, in the older literature (including notably John Chipman Gray's *The Nature and Sources of the Law*) courts were often distinguished from administrative or executive agencies on the ground that it is the function of courts to "declare rights."<sup>9</sup> If, then, we seek to define "the limits of adjudication," a tempting answer would be that the proper province of courts is limited to cases where rights are asserted. On reflection we might enlarge this to include cases where fault or guilt is charged (broadly, "the trial of accusations"), since in many cases it is artificial to treat the accuser (who may be the district attorney) as claiming a right. Though it is not particularly artificial to view the lawbreaker as violating "a right" of the state, to say that when the state indicts the lawbreaker it is claiming a remedial "right" against him does seem to reflect a misguided impulse toward forcing a symmetry between civil and criminal remedies. To avoid any such manipulations of natural modes of thought, let us then amend the suggested criterion to read as follows: The proper province of adjudication is to make an authoritative determination of questions raised by claims of right and accusations of guilt.

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<sup>9</sup> [J.C. GRAY, *THE NATURE AND SOURCES OF THE LAW* 115 (2d ed. 1921).]

Is this a significant way of describing "the limits of adjudication"? I do not think so. In fact, what purports here to be a distinct assertion is merely an implication of the fact that adjudication is a form of decision that defines the affected party's participation as that of offering proofs and reasoned arguments. It is not so much that adjudicators decide only issues presented by claims of right or accusations. The point is rather that *whatever* they decide, or *whatever* is submitted to them for decision, tends to be converted into a claim of right or an accusation of fault or guilt. This conversion is effected by the institutional framework within which both the litigant and the adjudicator function.

Let me spell out rather painstakingly the steps of an argument that will show why this should be so. (1) Adjudication is a process of decision that grants to the affected party a form of participation that consists in the opportunity to present proofs and reasoned arguments. (2) The litigant must therefore, if his participation is to be meaningful, assert some principle or principles by which his arguments are sound and his proofs relevant. (3) A naked demand is distinguished from a claim of right by the fact that the latter is a demand supported by a principle; likewise, a mere expression of displeasure or resentment is distinguished from an accusation by the fact that the latter rests upon some principle. Hence, (4) issues tried before an adjudicator tend to become claims of right or accusations of fault.

We may see this process of conversion in the case of an employee who desires an increase in pay. If he asks his boss for a raise, he may, of course, claim "a right" to the raise. He may argue the fairness of the principle of equal treatment and call attention to the fact that Joe, who is no better than he, recently got a raise. But he does not have to rest his plea on any ground of this sort. He may merely beg for generosity, urging the needs of his family. Or he may propose an exchange, offering to take on extra duties if he gets the raise. If, however, he takes his case to an arbitrator he cannot, explicitly at least, support his case by an appeal to charity or by proposing a bargain. He will have to support his demand by a principle of some kind, and a demand supported by principle is the same thing as a claim of right. So, when he asks his boss for a raise, he may or may not make a claim of right; when he presents his demand to an arbitrator he *must* make a claim of right. (I do not overlook the possibility of the arbitrator's proposing to the parties a "deal" by which the employee would get the raise but take on extra duties. But it is obvious that in such a case the arbitrator steps out of the role of

adjudicator and assumes that of mediator. This kind of case presents the problem of "mixed forms" of ordering, which will be discussed later at some length. It may be observed that the American Arbitration Association strives to keep its arbitrators from assuming the role of mediators. Whatever the wisdom of this policy, it is apparent that it rests on some conception of the proper limits of adjudication and presents the sort of question toward which this paper is addressed.)

If the analysis presented here is correct, three aspects of adjudication that seem to present distinct qualities are in fact all expressions of a single quality: (1) the peculiar mode by which the affected party participates in the decision; (2) the peculiarly urgent demand of rationality that the adjudicative process must be prepared to meet; and (3) the fact that adjudication finds its normal and "natural" province in judging claims of right and accusations of fault. So, when we say that a party entering a contract, or voting in an election, has no "right" to any particular outcome, we are describing the same fundamental fact that we allude to when we say that adjudication has to meet a test of rationality or of "principle" that is not applied to contracts and elections.

In this connection it is interesting to recall that Langdell once argued that, although there are rights at law, there is no such thing as "a right in equity."<sup>10</sup> This is because, he contended, courts of law are bound by rules, while courts of equity proceed by discretion. A similar issue is presented by the question whether the regulations of administrative agencies create "rights" and by the common argument whether some dispensation resting within an agency's power is a matter of "right" or of "privilege." When it is said, for example, that entry into the legal profession is a matter of privilege and not of right, it is important to see that all that is really asserted is that a decision denying admission to the bar need not be supported by any general principle.

I have suggested that it is not a significant description of the limits of adjudication to say that its proper province lies where rights are asserted or accusations of fault are made, for such a statement involves a circle of reasoning. If, however, we regard a formal definition of rights and wrongs as a nearly inevitable product of the adjudicative process, we can arrive at what is perhaps the most significant of all limitations on the proper province of adjudication. Adjudication is not a proper form of

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<sup>10</sup> [Langdell, *Classifications of Rights and Wrongs* (pt. II), 13 HARV. L. REV. 659, 670-71 (1900), reprinted in C.C. LANGDELL, A BRIEF SURVEY OF EQUITY JURISDICTION 239, 251-52 (1905).]

social ordering in those areas where the effectiveness of human association would be destroyed if it were organized about formally defined "rights" and "wrongs." Courts have, for example, rather regularly refused to enforce agreements between husband and wife affecting the internal organization of family life. There are other and wider areas where the intrusion of "the machinery of the law" is equally inappropriate. An adjudicative board might well undertake to allocate one thousand tons of coal among three claimants; it could hardly conduct even the simplest coal-mining enterprise by the forms of adjudication. Wherever successful human association depends upon spontaneous and informal collaboration, shifting its forms with the task at hand, there adjudication is out of place except as it may declare certain ground rules applicable to a wide variety of activities.

These are vague and perhaps trite observations. I shall attempt to bring them into sharper focus in a later part of this paper, particularly in a discussion of the relative incapacity of adjudication to solve "polycentric" problems. Meanwhile, the point I should like to stress is that the incapacity of a given area of human activity to endure a pervasive delimitation of rights and wrongs is also a measure of its incapacity to respond to a too exigent rationality, a rationality that demands an immediate and explicit reason for every step taken. Back of both of these incapacities lies the fundamental truth that certain kinds of human relations are not appropriate raw material for a process of decision that is institutionally committed to acting on the basis of reasoned argument.

(It may be well here to deal parenthetically with one or two small points capable of giving difficulty. When we speak of adjudication as implying an institutional guarantee of participation in the decision by presenting proofs and arguments, we do not imply that the litigant must always avail himself of his right to this participation. The facts may be stipulated by agreement of the parties, thus dispensing with the necessity for proof in court. Again, one or both parties may waive argument. There is no real point of difficulty here, any more than there is in the fact that an election affords an opportunity for participation of which many qualified to vote do not avail themselves. A slightly more sticky point is this: there are exceptional instances of decisions between disputants where no argument is ever contemplated because it is superfluous. An example is where a dispute about "conformity to sample" arises between a seller and a buyer of textiles and the parties agree to abide by the decision of a laboratory. Whether such a process of decision should be called

“adjudication” is not a matter of real importance because its simplicity excludes the problems that are the subject of analysis in this essay.)

## V. ADJUDICATION AND THE RULE OF LAW

So far a point of crucial importance and difficulty has not been reached in this discussion. It has been repeatedly asserted that adjudication is institutionally committed to a “reasoned” decision, to a decision based on “principle.” But what is the source of the “principle” on the basis of which the case is to be argued and decided? Where do the parties and the adjudicator get their respective “reasons”?

Recent discussions of “the rule of law” reveal — or I should perhaps say, largely conceal — a very fundamental difference of opinion on this question of the source of principle. There is at present a very active movement aimed at extending the rule of law to international relations and at assisting peoples who have never known stable and constitutional government to achieve internally a condition known as the rule of law. Much of the discussion engendered is on an inspirational and rhetorical level that does not permit underlying difficulties to come to the surface. When, however, those difficulties are candidly faced a serious issue emerges that may be somewhat too simply stated as: Which comes first, courts or rules?

All are agreed that courts are essential to “the rule of law.” The object of the rule of law is to substitute for violence peaceful ways of settling disputes. Obviously peace cannot be assured simply by treaties, agreements, and legislative enactment. There must be some agency capable of determining the rights of parties in concrete situations of controversy. Beyond this point, however, disagreement begins.

On the one side the advocates of the view “first courts, then rules” see adjudication as the primary source of peaceful order. The essence of the rule of law consists in being assured of your day in court. Courts can be counted on to make a reasoned disposition of controversies, either by the application of statutes or treaties, or in the absence of these sources, by the development of rules appropriate to the cases before them and derived from general principles of fairness and equity.

Critics of this view assert that it does a disservice to a great and valid ideal. It dodges the whole issue of “justiciability” and assumes there can be no problem or controversy that lies beyond the limits of adjudication. It substitutes for critical judgment a naive trust in good intentions. It forgets that you cannot be fair

in a moral and legal vacuum. It ignores the fact that adjudication cannot function without some standard of decision, either imposed by superior authority or willingly accepted by the disputants. Without some standard of decision the requirement that the judge be impartial becomes meaningless. Similarly, without such a standard the litigants' participation through reasoned argument loses its meaning. Communication and persuasion presuppose some shared context of principle.

Furthermore, say these critics, it is futile to assume that the void can be filled by contracts and treaties. Where the words of an agreement have a plain and obvious meaning, public opinion will ordinarily supply a sufficient sanction to ensure its performance. The necessity of a resort to adjudication will arise precisely in those cases where the proper meaning of the contract is in dispute. International treaties are often filled with purposeful ambiguities; some issues are simply too touchy to be resolved by agreement. When a dispute later develops around such issues, the agreement offers no guidance. To demand of a court that it simply resolve such issues "fairly" is to ask the court to decide something about which the parties themselves could not agree and for the determination of which no standard exists. Furthermore, the most troublesome issues arising out of treaties often involve cases where the original situation, on the basis of which the parties contracted, has been overtaken by events, so that the factual underpinnings of the agreement have been removed. In such a case, the court either has to declare the agreement no longer in force, thus leaving itself and the parties without any standard of decision, or it has to engage in a drastic revision of the contract, again without the guidance of any clear standard.

To all this argument the opposing party enters a rejoinder along these lines: The views just expressed are founded on a gross ignorance of history. The two great systems of law that dominate the world today — the common law and the civil law — took their origins in a case-by-case evolution of doctrine. Even today when developments occur in the common law it is usually only at the end of a series of cases that the governing principle becomes clear. In the civil law countries the codes from which courts purport to derive their principles often provide little beyond a vocabulary for stating legal results. They are filled with clauses referring to "good faith," "equity," "fair practice," and the like — standards that any court could apply without the aid of a code. One of the best of modern codes, the Swiss Code of Obligations, lays down very few rules and contents itself largely with charting the range of judicial discretion and with setting forth what might be called checklists for the judge to consult to make certain that he has

overlooked no factor properly bearing on the exercise of his discretion.

To this argument the final reply would probably run somewhat as follows: The views just expressed themselves betray a deep ignorance of history. The developments related have occurred in situations where there was already outside the law a strong sense of community, where there were generally shared conceptions of right and wrong that could gradually be crystallized into legal doctrine. In a community of traders, apparently vague phrases like "fair practice" have a definiteness of meaning that they cannot have in international relations or among people just emerging from primitive feudalism. Where legal rules have evolved out of the process of adjudication, law has in effect been built on community. Uncritical proponents of extending the rule of law propose to build community on law. It cannot be done.

A less compromising reply would be given by Friedrich A. Hayek, a true stalwart of the "law first, then courts" school of thought. In his lectures *The Political Ideal of the Rule of Law*, he declares his conviction that the case-by-case methods of the common law are inconsistent with the ideal of the rule of law.<sup>11</sup> The startling conclusion seems to follow that precisely those nations that have most often been held up as ideals of a peaceful and just internal order themselves violate the rule of law by their systems of adjudication. Hayek further connects the decline of the liberal state in Europe and the rise of totalitarian philosophies with the increasing use of vague provisions in codes, such as those requiring "good faith" and "fair practice" without further specification of the kind of behavior intended.<sup>12</sup>

Now it seems to me clear that, if we exclude such extreme views as that of Hayek, there is much to be said for both sides. We need, I believe, to keep two important truths before us: (1) It is sometimes possible to initiate adjudication effectively without definite rules; in this situation a case-by-case evolution of legal principle does often take place. (2) This evolution does not always occur, and we need to analyze more clearly than we generally have what conditions foster or hinder it.

A good many of our regulatory agencies were initiated in the hope that as knowledge was gained case by case a body of principle would emerge that would be understandable by all concerned and that would bring their adjudicative decisions within the rule of law. In some cases this hope has been at least partially vindicated; in others it has been almost completely disappointed. Here is a pool of experience that has been inadequately tapped.

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<sup>11</sup> [F.A. HAYEK, *THE POLITICAL IDEAL OF THE RULE OF LAW* 19 (1955).]

<sup>12</sup> [*Id.* at 35, 39-42.]

It may be suggested, parenthetically, that the often remarked tendency of regulatory agencies to identify themselves with the interests of the industry they regulate may proceed from a deeper cause than mere familiar rubbing of elbows or a desire on the part of the regulator to curry favor with an industry that may some day put him on its payroll. I suggest that the cause may lie in a desire to escape the frustration of trying to act as a judge in a situation affording no standard of decision. To escape from a moral vacuum one has to identify oneself with something, and the most obvious object of identification lies in the regulated industry.

It will be useful at this point to consider a kind of paradigm instance of a case-by-case growth of legal doctrine. The model or example I am about to present has been borrowed from an earlier article of mine.<sup>13</sup> The cases are of course schematic and hypothetical. They are given in the order of their assumed chronology. The parties in each case are different persons, but to facilitate comparisons the symbols used to designate the parties will be the same throughout and will indicate the role played by the particular party; thus in all five cases *O* will designate the original owner of the horse which came by theft or fraud into the hands of *T*.

*Case No. 1.* *T* steals *O*'s horse and sells it to *G*, who pays full value for it and has no reason to know it had been stolen from *O*. *O* brings suit against *G* to recover the horse. *Held*, for *O*. One of the deterrents to thievery is the difficulty of disposing of stolen goods. If a purchaser like *G* were able to take goods free of the claim of the true owner, a market for stolen goods would be created and thus an incentive to theft. In any event, it was impossible for *T*, a thief who had no rightful title to the horse, to pass any title to *G*; he who has nothing can give nothing.

*Case No. 2.* *T* buys a horse from *O* giving as payment a forged note purporting to be that of *X*. *T* knew that the note was forged. After delivering the horse to *T*, *O* discovers that he has been defrauded. He brings suit against *T* to recover the horse. It is argued on behalf of *T* that *O* delivered the horse to him with the intent to confer title; the horse is now *T*'s and *O*'s only remedy is to sue for the price. *Held*, for *O*. The passage of title was vitiated by the fraud of *T*; title throughout remained in *O*.

*Case No. 3.* The case is similar to Case No. 2, except that after receiving possession of the horse, *T* sold it to *G*, who knew *T* had bought it from *O* but had no reason to know that *T* had worked any fraud on *O*. *O* brings suit against *G* to recover the

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<sup>13</sup> [Fuller, *A Rejoinder to Professor Nagel*,] 3 NAT. L.F. 83, 96-98 (1958).

horse. It is argued on behalf of *O* that title remained in him in accordance with the principle laid down in Case No. 2. Since *T* had no title, he could pass none to *G*. *Held*, for *G*. It would be an intolerable burden on commerce if purchasers of property were compelled to scrutinize the details of a transaction by which the former owner voluntarily delivered it into the hands of the person now offering it for sale. Fraud takes many and subtle forms; if the victim could not recognize it, it is unreasonable to ask of a stranger to the transaction that he ascertain whether it was present. With respect to Case No. 2, all that was said there was with reference to the legal relations between the owner and the defrauder; the court's mind was not directed toward the possibility that a subsequent purchaser, like *G*, might intervene. The principle we are here applying is that if the horse is in the hands of *T* or of someone who knew of his fraud, it may be recovered by *O*. In the hands of an innocent purchaser like *G*, the horse may not be recovered by *O*, for reasons we have already indicated.

*Case No. 4.* The case is like Case No. 3, except that after buying the horse from *T*, *G* sold it to *K*, who, before he bought the horse from *G*, had been informed of the fraud worked by *T* on *O*. *O* sues *K* to recover the horse. It is argued on behalf of *O* that *K* was not an innocent purchaser, since he knew of *T*'s fraud when he bought the horse. In accordance with the principle laid down in Case No. 3, *O* became entitled to the horse when it came into the hands of *K*. *Held*, for *K*. If the argument made by *O* were accepted, it would be possible for a person in the position of *O* to destroy the value of the title acquired by *G* simply by giving general publicity to the fact that *T* had induced the sale by fraud. Thus the objective of protecting the bona fide purchaser *G* would be defeated, for his property would become unsalable. When the court in Case No. 3 said that *O* could recover the horse from anyone who knew of the fraud of *T*, it did not have in mind the possibility that the horse might have passed previously through the hands of a bona fide purchaser like *G*. When the horse was bought from *T* by *G*, title to it was perfected and was no longer vulnerable to attack by *O*. *G* was then free to sell it to anyone he saw fit.

*Case No. 5.* This case is like Case No. 4, except that *K* not only knew of *T*'s fraud but had participated in it by forging *X*'s name on the note used by *T* to pay *O* for the horse. *O* sues *K* to recover the horse. *K* rests his defense on the reasoning of Case No. 4; *G* had title to the horse and was free to sell it to anyone he saw fit. If *K* was guilty of any misconduct, that is a question for the criminal law; it ought not to affect his property rights. *Held?* . . . perhaps it would be well to suspend the series at this

point and leave to the reader the burden of decision and the more onerous burden of explanation.

Although the development here traced is considerably neater than anything likely to be encountered in legal history, I assume that lawyers would generally agree that this sort of thing does occur. I assume also it will be agreed that, despite the zigzag pattern which the decisions seem to present, the process illustrated is a "rational" one, falling within the limits of meaningful adjudication. What is the source of this "rational" quality? It seems clear that it derives from the fact that the courts engaged in this development are drawing out the necessary, or at least the reasonable, implications of a regime of private property and exchange.

I suggest more generally that where adjudication appears to operate meaningfully without the support of rules formally declared or accepted in advance, it does so because it draws its intellectual sustenance from the two basic forms of social ordering I have already described. It has done this historically with most notable success in the field where the accepted objective is to develop a regime of reciprocity or exchange. Students of comparative law are often struck by the fact that in the area of commercial transactions courts operating in entirely different environments of legal doctrine will often reach identical or similar results in the decision of actual cases.

But the possibility of a case-by-case development of principle is by no means confined to the field of commercial transactions. For example, the demands of a viable system of federalism are by no means immediately obvious. In gradually discovering and articulating the principles that will make federalism work, the courts may exemplify the process Mansfield had in mind when he spoke of the law "working itself pure."<sup>14</sup> Indeed, just such a development was envisaged by Hamilton in No. 82 of the *Federalist Papers*, where he wrote:

The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties. 'Tis time only that can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent whole.<sup>15</sup>

Obviously this kind of development — this gradual tracing out of the full implications of a system already established — can

<sup>14</sup> [See 12 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 551 (1938).]

<sup>15</sup> [THE FEDERALIST No. 82 vol. 2, at 130 (A. Hamilton) (Tudor ed. 1947).]

take place only in an atmosphere dominated by the shared desire to make federalism work.

It should be made clear that the view expressed here is radically different from one which it superficially resembles that threatens to become commonplace in sociology. I refer to the conception that in a sufficiently homogeneous society certain "values" will develop automatically and without anyone intending or directing their development. In such a society it is assumed that the legal rules developed and enforced by courts will reflect these prevailing "values." In our own discussion, however, we are not talking about disembodied "values" but about human purposes actively, if often tacitly, held and given intelligent direction at critical junctures. In working out the implications of federalism or of a regime of exchange, a court is not an inert mirror reflecting current mores but an active participant in the enterprise of articulating the implications of shared purposes.

If the conception here advanced is sound, it follows that in extending "the rule of law" to international relations, law and community of purpose must develop together. It is also apparent that a community of purpose which consists simply in a shared desire to avoid reciprocal destruction is too impoverished to furnish a proper basis for meaningful adjudication. Where the only shared objective is the negative one of preventing a holocaust, there is nothing that can make meaningful a process of decision that depends upon proofs and reasoned argument. It is of course conceivable that, moved by a desire to prevent such a holocaust, two nations (say, Russia and the United States) might submit a dispute to arbitration, but they would do so in much the same spirit that they might resort to a throw of the dice — unless there were perceived by both some body of principle, however vague, that might control and give rationality to the decision. Such a body of emergent principle would have to derive from one of the two basic principles of order. In practice this would mean that it would have to derive from relationships of reciprocity. Hence a desideratum of overriding importance in the relations of Russia and the United States is the development of every possible bond of reciprocity, every kind of useful exchange, between the two countries. This is essential not merely to promote "understanding" and an atmosphere of good will but to create a community of interest from which adjudication can draw intellectual sustenance.

In this connection a development has occurred that, from one point of view, seems to leave no hope for the rule of law in international relations, but seen from a different vantage point will appear as a most encouraging portent. In agreements with

foreign traders Soviet industry has insisted on the inclusion of a clause subjecting all disputes arising out of the agreement to arbitration before a specially constituted Soviet board of arbitration. On its face, one of the most fundamental principles of the rule of law — that no man shall be judge in his own cause — seems to be violated. (On a purely formal level, it should be noted, the rule is equally violated by the United States Court of Claims.) Soviet lawyers seem genuinely eager that this Soviet tribunal shall establish a reputation for impartiality and fairness. Its decisions so far seem generally to merit for it such a reputation.<sup>16</sup> Where does this tribunal get its standards of decision? Essentially they are those of a bourgeois trading community. Where else could one go for standards of fair dealings between traders? (The situation is reminiscent of certain communities in Delaware dedicated to the principles of the single tax as taught by Henry George.<sup>17</sup> In disputes between these communities and their members concerning the rate to be paid for the use of land, arbitrators have been compelled to turn to the hated and rejected land market as offering the only meaningful standard of decision.)

When the Soviet commercial tribunals have to take their standards of fairness from a system their philosophy condemns, the way has been paved for wider understanding, and with it an atmosphere in which there is a real basis for the hope that nations may yet be subjected to the rule of law.

There remains one further point of capital importance, though of a somewhat abstruse nature. This relates to a possible obstacle to the development of the rule of law that may be presented by the prevailing temper of Western philosophy. I am speaking chiefly of professional philosophy, and particularly of the philosophy taught in British and American universities. Though the direct influence of this philosophy in practical affairs is slight, its indirect influence may be of enormous significance. Generations of students have been raised in a university atmosphere strongly imbued with the tenets of the philosophers' philosophy of which I speak.

There is a line of thought going back to David Hume according to which there are two areas, and two areas only, for the operation of human reason. These are the areas of empirical fact and of logical implication.<sup>18</sup> Stated in another way, the human mind can occupy itself either by observing facts and testing hypotheses about these facts or by tracing out the logical implica-

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<sup>16</sup> See Pisar, *The Communist System of Foreign-Trade Adjudication*, 72 HARV. L. REV. 1409 (1959).

<sup>17</sup> [H. GEORGE, *PROGRESS AND POVERTY* (75th ed. 1955).]

<sup>18</sup> [D. HUME, *A TREATISE OF HUMAN NATURE* 463 (L. Selby-Bigge ed. 1888).]

tions of agreed premises. There is no *tertium quid*. If in any process of human decision there enters any element that is not traceable to empirical fact or logical entailment, it is not and cannot be a "rational" element; its origin must be in "sentiment," not in "reason."

Now in Hume's time the implications of this philosophy were perceived clearly enough, but they were not really taken seriously. Men went right on discussing and arguing issues of morality, law, and politics, assuming all the while that they were engaged in rational discourse, though it was apparent that very little of what they said — and that generally the least important — had to do with empirical fact or logical deduction. But as the decades passed the exclusions implied in the Humean view came to be taken more seriously and applied more rigorously. More important, these exclusions passed over into the general climate of our times.<sup>19</sup>

The view taken in this paper is that adjudication is a form of social ordering institutionally committed to "rational" decision. This follows from the only mode of participation it accords to the affected party, the litigant. If we combine this view with the Humean philosophy, what is the result? It is apparent that adjudicators seldom rest their decisions directly on matters of empirical fact. When they seem to do this the "facts" they find are not the kind contemplated by Hume, since they are generally human faults or shortcomings. To "find" such a "fact" is to express a condemnation — something remote from Hume's "matters of fact." This leaves logical deduction. Now it is apparent that when adjudication proceeds by previously established rules, at least one aspect of the tribunal's task involves something akin to logical deduction. If this is the only significant area of rationality permitted to adjudication, then it can act rationally only insofar as it applies previously established rules. This seems to be the basis on which Hayek reaches his startling conclusion that the whole system of the common law is violative of the rule of law.<sup>20</sup>

Let us apply the Humean test of reason to the paradigm or model of a case-by-case evolution of legal doctrine previously given, that involving a series of cases having to do with the buying and stealing of horses. Now there is little in these cases exemplifying anything like a discovery of empirical fact. In the early cases the courts did not have imagination enough to foresee the situations of fact that did later arise, but when those situations arose they contained nothing not accessible to the minds of the judges

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<sup>19</sup> See J.W. SMITH, *THEME FOR REASON* [145-46, 176-77] (1957).

<sup>20</sup> [F.A. HAYEK, *supra* note 11, at 34-36.]

from the beginning. Nor is there much that can be called deduction from explicit premises. Indeed, the premises seem to be shaped by the conclusions, and clarity of premise comes at the end of the development, not at the beginning. Are we justified in calling the process that is exemplified a "rational" one? By the Humean test, the answer would have to be, "No," and the appearance of rationality would have to rest on some self-deception. This is, in fact, the conclusion apparently reached apropos of the model presented here by a leading American logician.<sup>21</sup>

There is, I submit, a third area of rational discourse, not embraced by empirical fact or logical implication. This is the area where men seek to trace out and articulate the implications of shared purposes. The intellectual activity that takes place in this area resembles logical deduction, but it also differs in important respects from it. In logical deduction, the greater the clarity of the premise, the more secure will be the deduction. In the process I have in mind the discussion often proceeds most helpfully when the purposes, which serve as "premises" or starting points, are stated generally and are held in intellectual contact with other related or competing purposes. The end result is not a mere demonstration of what follows from a given purpose but a reorganization and clarification of the purposes that constituted the starting point of inquiry.

However we may define this third area, a rigid adherence to the Humean view is, I believe, destructive of any understanding of the problems of adjudication. It not only falsifies the conditions essential for the effective operation of adjudication but distorts the meaning of any adjudicative process that is functioning successfully.

## VI. THE FORMS OF ADJUDICATION

### 1. *Introduction*

The remainder of this paper will be divided into three main sections: The Forms of Adjudication, The Limits of Adjudication, and Mixed, Parasitic, and Perverted Forms of Adjudication. Of course, all of these topics stand in close relation to one another and some degree of anticipation will be unavoidable.

For example, the limits of adjudication are affected by its forms. Reference has already been made to so-called "tripartite" arbitration. This special and deviant form of adjudication sometimes makes it possible to undertake through an adjudicative process tasks that could not otherwise be handled satisfactorily

<sup>21</sup> See Nagel, *Fact, Value and Human Purpose*, 4 NAT. L.F. 26 (1959).

through adjudication at all. At the same time, this form may impair the effectiveness of adjudication in its more usual employments.

The joining of "mixed, parasitic, and perverted" forms of adjudication in one title should not mislead the reader into thinking that this paper condemns all departures of adjudication from a state of pristine purity. Certain mixed forms are valuable and almost indispensable, though their use is often attended by certain dangers.

In determining whether a deviant or mixed form impairs the integrity of adjudication the test throughout will be that already stressed repeatedly: Does it affect adversely the meaning of the affected party's participation in the decision by proofs and reasoned arguments?

## 2. *Is an Adversary Presentation Necessary to Adjudication?*<sup>22</sup>

### *The Lawyer's Role as Advocate in Open Court*

The lawyer appearing as an advocate before a tribunal presents, as persuasively as he can, the facts and the law of the case as seen from the standpoint of his client's interest. It is essential that both the lawyer and the public understand clearly the nature of the rôle thus discharged. Such an understanding is required not only to appreciate the need for an adversary presentation of issues, but also in order to perceive truly the limits partisan advocacy must impose on itself if it is to remain wholesome and useful.

In a very real sense it may be said that the integrity of the adjudicative process itself depends upon the participation of the advocate. This becomes apparent when we contemplate the nature of the task assumed by any arbiter who attempts to decide a dispute without the aid of partisan advocacy.

Such an arbiter must undertake, not only the role of judge, but that of representative for both of the litigants. Each of these roles must be played to the full without being muted by qualifications derived from the others. When he is developing for each side the most effective statement of its case, the arbiter must put aside his neutrality and permit himself to be moved by a sympathetic identification sufficiently intense to draw from his mind all that it is capable of giving, — in analysis, patience and creative power. When he resumes his neutral position, he must

<sup>22</sup> [Under this heading in the original text, Mr. Fuller simply referred the reader to a statement coauthored with John D. Randall entitled *Professional Responsibility: Report of the Joint Conference*. The Joint Conference on Professional Responsibility was established in 1952 by the American Bar Association and the Association of American Law Schools. The *Report* appeared in 44 A.B.A.J. 1159 (1958). A few excerpts from the *Report*, *id.* at 1160-61, 1162, 1216, have been inserted into the text.]

be able to view with distrust the fruits of this identification and be ready to reject the products of his own best mental efforts. The difficulties of this undertaking are obvious. If it is true that a man in his time must play many parts, it is scarcely given to him to play them all at once.

It is small wonder, then, that failure generally attends the attempt to dispense with the distinct roles traditionally implied in adjudication. What generally occurs in practice is that at some early point a familiar pattern will seem to emerge from the evidence; an accustomed label is wanting for the case and, without awaiting further proofs, this label is promptly assigned to it. It is a mistake to suppose that this premature cataloguing must necessarily result from impatience, prejudice or mental sloth. Often it proceeds from a very understandable desire to bring the hearing into some order and coherence, for without some tentative theory of the case there is no standard of relevance by which testimony may be measured. But what starts as a preliminary diagnosis designed to direct the inquiry tends, quickly and imperceptibly, to become a fixed conclusion, as all that confirms the diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention.

An adversary presentation seems the only effective means for combatting this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known. The arguments of counsel hold the case, as it were, in suspension between two opposing interpretations of it. While the proper classification of the case is thus kept unresolved, there is time to explore all of its peculiarities and nuances.

These are the contributions made by partisan advocacy during the public hearing of the cause. When we take into account the preparations that must precede the hearing, the essential quality of the advocate's contribution becomes even more apparent. Preceding the hearing, inquiries must be instituted to determine what facts can be proved or seem sufficiently established to warrant a formal test of their truth during the hearing. There must also be a preliminary analysis of the issues, so that the hearing may have form and direction. These preparatory measures are indispensable whether or not the parties involved in the controversy are represented by advocates.

Where that representation is present there is an obvious advantage in the fact that the area of dispute may be greatly reduced by an exchange of written pleadings or by stipulations of counsel. Without the participation of someone who can act responsibly for each of the parties, this essential narrowing of the issues becomes impossible. But here again the true significance of partisan advocacy lies deeper, touching once more the integrity of the adjudicative process itself. It is only through the advocate's participation that the hearing may remain in fact what it purports to be in theory: a public trial of the facts and issues.

Each advocate comes to the hearing prepared to present his proofs and arguments, knowing at the same time that his arguments may fail to persuade and that his proofs may be rejected as inadequate. It is a part of his role to absorb these possible disappointments. The deciding tribunal, on the other hand, comes to the hearing uncommitted. It has not represented to the public that any fact can be proved, that any argument is sound, or that any particular way of stating a litigant's case is the most effective expression of its merits.

These, then, are the reasons for believing that partisan advocacy plays a vital and essential role in one of the most fundamental procedures of a democratic society. But if we were to put all of these detailed considerations to one side, we should still be confronted by the fact that, in whatever form adjudication may appear, the experienced judge or arbitrator desires and actively seeks to obtain an adversary presentation of the issues. Only when he has had the benefit of intelligent and vigorous advocacy on both sides can he feel fully confident of his decision.

Viewed in this light, the role of the lawyer as a partisan advocate appears not as a regrettable necessity, but as an indispensable part of a larger ordering of affairs. The institution of advocacy is not a concession to the frailties of human nature, but an expression of human insight in the design of a social framework within which man's capacity for impartial judgment can attain its fullest realization.

When advocacy is thus viewed, it becomes clear by what principle limits must be set to partisanship. The advocate plays his role well when zeal for his client's cause promotes a wise and informed decision of the case. He plays his role badly, and trespasses against the obligations of professional responsibility, when his desire to win leads him to muddy the headwaters of decision, when, instead of lending a needed perspective to the controversy, he distorts and obscures its true nature.

### *The Lawyer as a Guardian of Due Process*

The lawyer's highest loyalty is at the same time the most intangible. It is a loyalty that runs, not to persons, but to procedures and institutions. The lawyer's role imposes on him a trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends.

Everywhere democratic and constitutional government is tragically dependent on voluntary and understanding co-operation in the maintenance of its fundamental processes and forms.

It is the lawyer's duty to preserve and advance this indispensable co-operation by keeping alive the willingness to engage in it and by imparting the understanding necessary to give it direction

and effectiveness. This is a duty that attaches not only to his private practice, but to his relations with the public. In this matter he is not entitled to take public opinion as a datum by which to orient and justify his actions. He has an affirmative duty to help shape the growth and development of public attitudes toward fair procedures and due process.

### 3. *May the Arbiter Act on His Own Motion in Initiating the Case?*

In his *The Nature and Sources of the Law*, John Chipman Gray wrote:

A judge of an organized body is a man appointed by that body to determine duties and the corresponding rights *upon the application of persons claiming those rights*. It is the fact that such application must be made to him, which distinguishes a judge from an administrative officer. The essence of a judge's office is that he shall be impartial, that he is to sit apart, is not to interfere voluntarily in affairs . . . but is to determine cases which are presented to him. To use the phrase of the English Ecclesiastical courts, the office of the judge must be promoted by some one.<sup>23</sup>

A German socialist critic of "bourgeois law" once caricatured this view by saying that courts are like defective clocks; they have to be shaken to set them going. He, of course, added the point that shaking costs money.

Certainly it is true that in most of the practical manifestations of adjudication the arbiter's function has to be "promoted" by the litigant and is not initiated by itself. But is this coy quality of waiting to be asked an essential part of adjudication?

It would seem that it is not. Suppose, for example, the collision of two ships under circumstances that suggest that one or both masters were at fault. Suppose a board is given authority to initiate hearings in such a case and to make a determination of fault. Such a board might conduct its hearings after the pattern of court proceedings. Both masters might be accorded counsel and a full opportunity for cross-examination. There would be no impairment of the affected parties' full participation by proofs and reasoned argument; the integrity of adjudication seems to be preserved.

Yet I think that most of us would consider such a case exceptional and would not be deterred by it from persisting in the belief that the adjudicative process should normally not be initiated by the tribunal itself. There are, I believe, sound reasons for adhering to that belief.

Certainly it is clear that the integrity of adjudication is im-

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<sup>23</sup> [J.C. GRAY, *supra* note 9, at 114-15.]

paired if the arbiter not only initiates the proceedings but also, in advance of the public hearing, forms theories about what happened and conducts his own factual inquiries. In such a case the arbiter cannot bring to the public hearing an uncommitted mind; the effectiveness of participation through proofs and reasoned arguments is accordingly reduced. Now it is probably true that under most circumstances the mere initiation of proceedings carries with it a certain commitment and often a theory of what occurred. The case of the collision at sea is exceptional because there the facts themselves speak eloquently for the need of some kind of inquiry, so that the initiation of the proceedings implies nothing more than a recognition of this need. In most situations the initiation of proceedings could not have the same neutral quality, as, for example, where the occasion consists simply in the fact that a corporation had gone two years without declaring a dividend.

There is another reason which justifies the common conception that it is not normal for the adjudicative process to be initiated by the deciding tribunal. If we view adjudication in its widest extension, as including not only the work of courts but also that of arbitrators in labor, commerce, and international relations, it is apparent that the overwhelming majority of cases submitted to adjudication involve the assertion of claims founded directly or indirectly on *contract* or *agreement*. It seems clear that a regime of contract (more broadly, a regime of reciprocity) implies that the determination whether to assert a claim must be left to the interested party.

A contrary suggestion is advanced by Karl Llewellyn in *The Cheyenne Way*. In answer to the question "Why do we leave it to the affected party whether to assert his claim for breach of contract?" he gives the startling explanation that this is because as a matter of actual experience the motive of self-interest has proved sufficient to maintain a regime of contract.<sup>24</sup> He suggests that if in the future this motive were to suffer a serious decline, then the state might find itself compelled to intervene to strengthen the regime of contract. This curious conception is symptomatic of a general tendency of our times to obscure the role of reciprocity as an organizing principle and to convert everything into "social policy," which is another way of saying that all organization is by common aims (or by the aims that in the mind of the "policy-maker" ought to be common).

Any individual contract serves "society" only insofar as society is interested in the individual enrichment made possible by a regime of reciprocity. (Naturally, "individual" here has to be given an extended meaning to include groups and formal entities

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<sup>24</sup> [K.N. LLEWELLYN & E.A. HOEBEL, *THE CHEYENNE WAY* 48 (1941).]

like the corporation.) If two men discover that by an agreement each can profit by giving up something he values less than the thing he receives in exchange for it, the individuals are enriched by virtue of their own evaluations of the objects of the exchange. If ten days after the agreement is entered there is a change in those evaluations, so that neither party has any further interest in the performance of the agreement, this is as much their affair as was the original agreement. To enforce a contract for a party who is willing to leave it unenforced is just as absurd as making the contract for him in the first place. (I realize, of course, that there are contracts required by law, but this is obviously a derivative phenomenon which would lose all meaning if every human relation were imposed by the state and were called a "contract.")

The belief that it is not normal for the arbiter himself to initiate the adjudicative process has, then, a twofold basis. *First*, it is generally impossible to keep even the bare initiation of proceedings untainted by preconceptions about what happened and what its consequences should be. In this sense, initiation of the proceedings by the arbiter impairs the integrity of adjudication by reducing the effectiveness of the litigant's participation through proofs and arguments. *Second*, the great bulk of claims submitted to adjudication are founded directly or indirectly on relationships of reciprocity. In this case, unless the affected party is deceived or ignorant of his rights, the very foundations of the claim asserted dictate that the processes of adjudication must be invoked by the claimant.

#### 4. *Must the Decision Be Accompanied by a Statement of the Reasons for It?*

We tend to think of the judge or arbitrator as one who decides and who gives reasons for his decision. Does the integrity of adjudication require that reasons be given for the decision rendered? I think the answer is, not necessarily. In some fields of labor arbitration (chiefly, I believe, where arbitration is a facility made available without charge by the state) it is the practice to render "blind" awards. The reasons for this practice probably include a belief that reasoned awards are often misinterpreted and "stir up trouble," as well as the circumstance that the arbitrator is so busy he has no time to write opinions. Under the procedures of the American Arbitration Association awards in commercial cases are rendered usually without opinion. (Written opinions are, however, usual in *labor* cases.) Perhaps the special practice in commercial cases has arisen because arbitrators in such cases normally serve without fee and writing opinions is hard work. Perhaps also there is a fear that explanations ineptly

phrased by lay arbitrators might open too wide a door to judicial review.

By and large it seems clear that the fairness and effectiveness of adjudication are promoted by reasoned opinions. Without such opinions the parties have to take it on faith that their participation in the decision has been real, that the arbiter has in fact understood and taken into account their proofs and arguments. A less obvious point is that, where a decision enters into some continuing relationship, if no reasons are given the parties will almost inevitably guess at reasons and act accordingly. Here the effectiveness of adjudication is impaired, not only because the results achieved may not be those intended by the arbiter, but also because his freedom of decision in future cases may be curtailed by the growth of practices based on a misinterpretation of decisions previously rendered.

*5. May the Arbiter Rest His Decision on Grounds Not Argued by the Parties?*

Obviously the bond of participation by the litigant is most secure when the arbiter rests his decision wholly on the proofs and argument actually presented to him by the parties. In practice, however, it is not always possible to realize this ideal. Even where all of the considerations on which the decision rests were touched on by the parties' arguments, the emphasis may be very different. An issue dealt with only in passing by one of the parties, or perhaps by both, may become the headstone of the arbiter's decision. This may mean not only that, had they foreseen this outcome, the parties would have presented different arguments, but that they might also have introduced evidence on very different factual issues.

If the ideal of a perfect congruence between the arbiter's view of the issues and that of the parties is unattainable, this is no excuse for a failure to work toward an achievement of the closest approximation of it. We need to remind ourselves that if this congruence is utterly absent — if the grounds for the decision fall completely outside the framework of the argument, making all that was discussed or proved at the hearing irrelevant — then the adjudicative process has become a sham, for the parties' participation in the decision has lost all meaning. We need to analyze what factors influence the desired congruence and what measures may be taken to promote it.

One circumstance of capital importance is the extent to which a particular process of adjudication takes place in a context of established rules. In branches of the law where the rules have become fairly settled and certain, it may be possible for lawyers

to reach agreement easily in defining the crucial issues presented by a particular case. In such an area the risk is slight that the decision will fall outside the frame of reference set by the proofs and arguments. On the other hand, in areas of uncertainty, this risk is greatly increased. There are, to be sure, dangers in a premature crystallization of standards. On the other hand, one of the less obvious dangers of a too long delayed formulation of doctrine lies in the inevitable impairment of the integrity of adjudication that is entailed, for the reality of the parties' participation is reduced when it is impossible to foretell what issues will become relevant in the ultimate disposition of the case.

These are considerations often overlooked in criticisms of the conduct of administrative agencies and labor arbitrators. Ex parte posthearing conferences with the parties are often motivated by a well-intentioned desire to preserve the reality of the parties' participation in the decision. Where the standards of decision are vague and fluctuating, when the time comes for final disposition of the case it may be apparent that most of what was argued and proved at the public hearing has become irrelevant. A desire to give a litigant a meaningful "day in court" may, paradoxically, lead to giving him a lunchhour out of court. In many cases this conduct should be characterized as inept, rather than wicked.

Those inexperienced in legal procedures often do not know of devices which have been developed by courts that will eliminate much of the need for such practices. In particular, requests for a reargument and the device of the tentative decree, with something like an order to show cause why it should not be made final, could often be used with advantage by labor arbitrators and administrative tribunals. This is not to say that these expedients will solve all problems. An arbitrator paid on a per diem basis by the parties may hesitate to run up his bill by requesting a second argument. In some situations a tentative decree may arouse expectations of such an intensity that a later modification becomes very difficult. The fundamental point made here, however, is that before we demand of lay arbiters that they act like judges, we must place them in a context, and arm them with procedures, that will make it possible for them to do their job properly and still act throughout like judges. It is distressing to see Congress assign to administrative agencies tasks that plainly lie beyond the limits of adjudication and yet demand of those agencies that they act as if their tasks fell within those limits. Even more distressing is it when they are compelled to announce "standards" and "policies" which they consider they cannot conscientiously follow in the discharge of their duties.

In this rather messy situation the influence of the individual

practicing lawyer can be a most wholesome one. If he is an expert in a particular field of administrative law, he can often judge accurately in a particular case what issues will ultimately become crucial. This means that he will be able to present at the public hearing all that will be needed for a proper decision; thus the temptation of posthearing conferences may be removed. Generally the professional advocate can play an important role in preserving the integrity of adjudication. It is painful for a lawyer to attend the hearings of a board where most of the representation is by laymen, say, a board of appeals hearing applications for variances from zoning laws. The hearing is customarily devoted to irrelevancies, and the issues really pertinent to decision may be scarcely touched on in the arguments presented. This would be the situation in all fields of adjudication were we to remove from the scene the professional advocate. His presence is usually essential for adjudication to be in fact what it pretends to be.

I have mentioned two devices that can help to prevent a lack of fit between the case as argued and the case as decided — the request for a reargument and the tentative decree. Oral argument is also of the greatest importance in this connection, for a written submission is often truly a shot in the dark. In appellate cases it is also important that the judges have studied the record before oral argument, for without this preparation the virtue of the oral argument in defining the crucial issues may be lost.

So far I have been discussing precautionary measures that will reduce the risk that the arbiter will have to rest his decision on considerations not argued before him. I have assumed that the area of adjudication in question is such that these precautionary measures can have some measure of success. The matter stands quite differently when cases are assigned to a process called "adjudication" under circumstances such that the best informed advocate could not possibly present to the tribunal the grounds that must be taken into account in the decision. For example, G. D. H. Cole in his *Socialist Economics* proposes that under socialism wages should be set by "arbitrators" who would be "guided by common sense."<sup>25</sup> Presumably there would be public hearings and the affected employees would be permitted to present arguments in favor of an increase of their remuneration. However, Professor Cole recognizes that his "arbitrators" cannot be guided solely by what is argued before them. In fact, he recommends that they meet together from time to time to see to it that the combined effect of their awards will produce a proper flow of labor. Here, plainly, the bond of the affected party's participation has largely been destroyed. He is given the appearance of a hearing,

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<sup>25</sup> [G.D.H. COLE, *SOCIALIST ECONOMICS* 96 (1950).]

presumably because this will make him happier, but the grounds of decision are largely unrelated to what occurred at the hearing. Professor Cole's "arbitrators" are in fact business managers who from time to time put on a show by going through the motions of adjudication. This is the kind of case I have in mind in speaking of problems that fall beyond the limits of adjudication.

#### *6. Qualifications and Disqualifications of the Arbitrator*

A full discussion of the questions suggested by this title would lead too far afield for the purposes of this paper. Even a consideration of the comparative efficacy of the various devices intended to guarantee impartiality would require a long chapter.

I shall merely suggest that the problem of securing a properly qualified and impartial arbitrator be tried by the same touchstone that has been used throughout — what will preserve the efficacy and meaning of the affected party's participation through proofs and arguments? Obviously, a strong emotional attachment by the arbitrator to one of the interests involved in the dispute is destructive of that participation. In practice, however, another kind of "partiality" is much more dangerous. I refer to the situation where the arbitrator's experience of life has not embraced the area of the dispute, or, worse still, where he has always viewed that area from some single vantage point. Here a blind spot of which he is quite unconscious may prevent him from getting the point of testimony or argument. By and large I think the decisions of our courts in commercial cases do not represent adjudication at its highest level. The reason is a lack of judicial "feel" for the problems involved.

A sailor was once brought before a three-judge German court for violation of a provision of the criminal code which made it a serious offense to threaten another with bodily harm. Uncontradicted testimony proved that the prisoner had been heard to say, "I'll stick a knife in your guts and turn it around three times." Two judges, who had spent their lives in genteel surroundings far from the waterfront, were with great difficulty persuaded by the third to acquit.

#### *7. Must the Decision Be Retrospective?*

In practice both the decisions of courts and the awards of arbitrators are retrospective, both as to their effect on the litigants' rights and their effect as precedents for the decisions of other cases. A paradox is sometimes squeezed from this traditional way of acting, to the effect that courts, in order to avoid the appearance of legislating, cast their legislative enactments in the harshest possible form, making them *ex post facto*.

The philosophy underlying the retrospective effect of the judicial decision can be stated somewhat as follows: It is not the function of courts to create new aims for society or to impose on society new basic directives. The courts for various reasons analyzed previously are unsuited for this sort of task. Perhaps the most compelling objection to an assumption of any such function lies in the limited participation in the decision by the litigants who (1) represent generally only themselves and (2) participate in the decision only by proofs and arguments addressed to the arbiter. On the other hand, with respect to the generally shared aims and the authoritative directives of a society, the courts do have an important function to perform, that of developing (or even "discovering") case by case what these aims or directives demand for their realization in particular situations of fact. In the discharge of this function, at times the result is so obvious that no one thinks of a "retroactive effect." Theoretically, a court might distinguish between such decisions and those which announce a rule or standard that seems "new," even though it may represent a reasoned conclusion from familiar premises. But if an attempt were made to apply such a distinction pervasively, so that some decisions would be retrospective, some prospective only, the resulting confusion might be much less bearable than the situation that now obtains.

Generally the same considerations apply also to arbitration awards. It is not a matter of "concealing" the legislative nature of the arbitrator's award which makes him give it a retrospective effect. It is rather a conservative philosophy about the proper functions of adjudication, a philosophy which seeks to keep meaningful the adversary presentation, the participation of litigants only through appeals to reason, etc.

#### *8. Moot Cases and Declaratory Judgments*

There has not been time to consider seriously the problems presented by this title. It is believed, however, that the general analysis of this paper might be helpful in dealing with those problems.

#### *9. How Is Adjudication Affected by the Source of the Arbiter's Power?*

The power to adjudicate may represent a delegated power of government, as in the case of a judge, or it may derive from the consent of the litigants, as in most forms of arbitration. Are these two basically different "forms" of adjudication? Obviously it has been a tacit assumption of this paper that they are not.

On the other hand, this does not mean that the discharge of the arbiter's function is wholly unaffected by the source of his power. In a summary way we may say that the possible advantages of adjudication supported by governmental authority are: (1) The judge is under less temptation to "compromise" than is the contractually appointed arbitrator. (2) The acceptability of the judge's decision may be enhanced by the fact that he seems to play a subservient role, as one who merely applies rules which he himself did not make.

Among the possible advantages of adjudication which derives its power from a contract of the parties are the following: (1) Being unbacked by state power (or insufficiently backed by it in the case of an ineffective legal sanction), the arbitrator must concern himself directly with the acceptability of his award. He may be at greater pains than a judge to get his facts straight, to state accurately the arguments of the parties, and generally to display in his award a full understanding of the case. (2) Being relatively free from technical rules of procedure, the wise and conscientious arbitrator can shape his procedures upon what he perceives to be the intrinsic demands of effective adjudication. Thus, the "due process" which animates his conduct of the hearing may appear to the parties as something real and not something that has to be taken on faith, as allegedly inhering in technical rules that seem quite arbitrary to the layman.

As a special quality of contractually authorized arbitration, which cannot unequivocally be called either an "advantage" or "disadvantage," we may note that the contract to arbitrate may contain explicit or implicit limits upon the adjudicative process itself. The arbitrator often comes to the hearing with a feeling that he must conduct himself in a way that conforms generally to the expectations of the parties and that this restriction is implicit in the contract of submission. Thus, if both parties desire and expect a more "literal" interpretation than the arbitrator himself would prefer, he may feel obligated to adopt an attitude of interpretation that he finds intellectually uncongenial.

## VII. THE LIMITS OF ADJUDICATION

### 1. *Introduction*

Attention is now directed to the question, What kinds of tasks are inherently unsuited to adjudication? The test here will be that used throughout. If a given task is assigned to adjudicative treatment, will it be possible to preserve the meaning of the affected party's participation through proofs and arguments?

## 2. *Polycentric Tasks and Adjudication*

This section introduces a concept — that of the “polycentric” task — which has been derived from Michael Polanyi’s book *The Logic of Liberty*.<sup>26</sup> In approaching that concept it will be well to begin with a few examples.

Some months ago a wealthy lady by the name of Timken died in New York leaving a valuable, but somewhat miscellaneous, collection of paintings to the Metropolitan Museum and the National Gallery “in equal shares,” her will indicating no particular apportionment.<sup>27</sup> When the will was probated the judge remarked something to the effect that the parties seemed to be confronted with a real problem. The attorney for one of the museums spoke up and said, “We are good friends. We will work it out somehow or other.” What makes this problem of effecting an equal division of the paintings a polycentric task? It lies in the fact that the disposition of any single painting has implications for the proper disposition of every other painting. If it gets the Renoir, the Gallery may be less eager for the Cezanne but all the more eager for the Bellows, etc. If the proper apportionment were set for argument, there would be no clear issue to which either side could direct its proofs and contentions. Any judge assigned to hear such an argument would be tempted to assume the role of mediator or to adopt the classical solution: Let the older brother (here the Metropolitan) divide the estate into what he regards as equal shares, let the younger brother (the National Gallery) take his pick.

As a second illustration suppose in a socialist regime it were decided to have all wages and prices set by courts which would proceed after the usual forms of adjudication. It is, I assume, obvious that here is a task that could not successfully be undertaken by the adjudicative method. The point that comes first to mind is that courts move too slowly to keep up with a rapidly changing economic scene. The more fundamental point is that the forms of adjudication cannot encompass and take into account the complex repercussions that may result from any change in prices or wages. A rise in the price of aluminum may affect in varying degrees the demand for, and therefore the proper price of, thirty kinds of steel, twenty kinds of plastics, an infinitude of woods, other metals, etc. Each of these separate effects may have its own complex repercussions in the economy. In such a case it is simply impossible to afford each affected party a meaningful

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<sup>26</sup> [M. POLANYI, *THE LOGIC OF LIBERTY: REFLECTIONS AND REJOINDERS* 171 (1951).]

<sup>27</sup> [See *N.Y. Times*, May 15, 1960, at 77, col. 1.]

participation through proofs and arguments. It is a matter of capital importance to note that it is not merely a question of the huge number of possibly affected parties, significant as that aspect of the thing may be. A more fundamental point is that each of the various forms that award might take (say, a three-cent increase per pound, a four-cent increase, a five-cent increase, etc.) would have a different set of repercussions and might require in each instance a redefinition of the "parties affected."

We may visualize this kind of situation by thinking of a spider web. A pull on one strand will distribute tensions after a complicated pattern throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but will rather create a different complicated pattern of tensions. This would certainly occur, for example, if the doubled pull caused one or more of the weaker strands to snap. This is a "polycentric" situation because it is "many centered" — each crossing of strands is a distinct center for distributing tensions.

Suppose, again, it were decided to assign players on a football team to their positions by a process of adjudication. I assume that we would agree that this is also an unwise application of adjudication. It is not merely a matter of eleven different men being possibly affected; each shift of any one player might have a different set of repercussions on the remaining players: putting Jones in as quarterback would have one set of carryover effects, putting him in as left end, another. Here, again, we are dealing with a situation of interacting points of influence and therefore with a polycentric problem beyond the proper limits of adjudication.

Let me now mention a polycentric problem that would be difficult to handle by adjudication as usually conducted, where the form of adjudication is sometimes modified to accommodate it to the nature of the problem. A textile mill is in agreement with a labor union that its internal wage scale is out of balance; over the years the payments made for certain kinds of jobs have "got out of line" and are now too high or too low in comparison with what is paid for other jobs. The company and the union agree that a fund equal to five cents an hour for the whole payroll shall be employed to create a proper balance. If the parties are unable to agree on the adjustments that should be made, the question shall go to arbitration.

Here we have a problem with strong polycentric features. If the weavers are raised, say, more than three cents an hour, it will be necessary to raise the spinners; the spinners' wages are, however, locked in a traditional relationship with those of the spinning doffers, etc. If there are thirty different classifications in-

volved, it is obvious how many different forms the arbitration award might take; each pattern of the award could produce its own peculiar pattern of repercussions. If such a problem is presented to a single arbitrator, he will be under strong temptation to "try out" various forms of award in private conversations with the parties. Irregular and improper as such conversations may appear when judged by the usual standards of adjudication, it should be noted that the motive for them may be the arbitrator's desire to preserve the reality of the parties' participation in the decision — to preserve, in other words, the very core of adjudication.

Now it is in cases like this that the "tripartite" arbitration board finds its most useful application. The "impartial chairman" is flanked by two fellow arbitrators, one selected by the company, the other by the union. After the hearings the three consult together, the impartial chairman at some point proposing to the other members of the board various wage scales. He will in the process learn such things as that an increase for a particular occupation that seemed to him both proper and feasible will have repercussions in the bleachery of which he was unaware.

This is what I have called a "mixed" form of adjudication. In fact the device as I have stated it amounts to a mixture of adjudication and negotiation. All mixed forms have their dangers, and tripartite arbitration is no exception. The danger lies in the difficult role to be played by the flanking arbitrators. They can be neither wholly advocates nor wholly judges. They cannot perform their role adequately if they are completely impartial; it is their task during the deliberations to represent an interest, a point of view. It may be that they will wish to communicate with the parties they represent to inform themselves of the implications of some step proposed — though whether they should feel free to indulge in such consultations, and if so, to what extent, is one of the ambiguities that plague this form of arbitration. If, on the one hand, each of the flanking arbitrators must represent the party who appointed him, he must at the same time observe some of the restraints that go with a judicial position. If he runs back and forth between those he represents and the meetings of the arbitration board, reporting freely everything that happens during those meetings, the adjudicative process breaks down and there is substituted for it an awkward form of bargaining — in a situation, be it remembered, where negotiation has already failed to produce a solution.

As a prophylaxis against the arbitration's deteriorating into a mere continuation of bargaining — in an inept form — a variation on the tripartite pattern is now written into a good many labor

contracts. It is provided that a unanimous decision of the three arbitrators shall control, but if such a decision cannot be obtained, the chairman shall determine the rights of the parties. Where there is from the beginning no real hope of a unanimous decision, this arrangement comes close to being little more than a contractual legitimation of the practice of holding posthearing conferences, though it has the advantage of officially designating the representatives who may take part in these conferences. On the other hand, where there is some genuine prospect of a unanimous agreement, the arrangement preserves for the flanking arbitrators a role that retains some of the functions, and with them some of the restraints, that go with judicial office.

The description just given is of tripartite arbitration when it is employed intelligently and with some appreciation of its advantages and dangers. In practice it is often used uncritically and tends to deteriorate, on the one hand, into a kind of continuation of bargaining behind closed doors, or, on the other, into an empty form, whereby it is understood from the beginning that the chairman is the "real" arbitrator.

It should be carefully noted that a multiplicity of affected persons is not an invariable characteristic of polycentric problems. This is sufficiently illustrated in the case of Mrs. Timken's will. That case also illustrated the fact that rapid changes with time are not an invariable characteristic of such problems. On the other hand, in practice polycentric problems of possible concern to adjudication will normally involve many affected parties and a somewhat fluid state of affairs. Indeed, the last characteristic follows from the simple fact that the more interacting centers there are, the more the likelihood that one of them will be affected by a change in circumstances, and, if the situation is polycentric, this change will communicate itself after a complex pattern to other centers. This insistence on a clear conception of polycentricity may seem to be laboring a point, but clarity of analysis is essential if confusion is to be avoided. For example, if a reward of \$1000 is offered for the capture of a criminal and six claimants assert a right to the award, hearing the six-sided controversy may be an awkward affair. The problem does not, however, present any significant polycentric element as that term is here used.

Now, if it is important to see clearly what a polycentric problem is, it is equally important to realize that the distinction involved is often a matter of degree. There are polycentric elements in almost all problems submitted to adjudication. A decision may act as a precedent, often an awkward one, in some situation not foreseen by the arbiter. Again, suppose a court in a suit between one litigant and a railway holds that it is an act of negligence

for the railway not to construct an underpass at a particular crossing. There may be nothing to distinguish this crossing from other crossings on the line. As a matter of statistical probability it may be clear that constructing underpasses along the whole line would cost more lives (through accidents in blasting, for example) than would be lost if the only safety measure were the familiar "Stop, Look & Listen" sign. If so, then what seems to be a decision simply declaring the rights and duties of two parties is in fact an inept solution for a polycentric problem, some elements of which cannot be brought before the court in a simple suit by one injured party against a defendant railway. In lesser measure, concealed polycentric elements are probably present in almost all problems resolved by adjudication. It is not, then, a question of distinguishing black from white. It is a question of knowing when the polycentric elements have become so significant and predominant that the proper limits of adjudication have been reached.

In speaking of the covert polycentric elements almost always present in even the most simple-appearing cases, it should be noted that the efficacy of adjudication as a whole is strongly affected by the manner in which the doctrine of *stare decisis* is applied. If judicial precedents are liberally interpreted and are subject to reformulation and clarification as problems not originally foreseen arise, the judicial process as a whole is enabled to absorb these covert polycentric elements. By considering the process of decision as a collaborative one projected through time, an accommodation of legal doctrine to the complex aspects of a problem can be made as these aspects reveal themselves in successive cases. On the other hand, if a strict or "literal" interpretation is made of precedents, the limits of adjudication must perforce be more strictly drawn, for its power of accommodation has been reduced.

If problems sufficiently polycentric are unsuited to solution by adjudication, how may they in fact be solved? So far as I can see, there are only two suitable methods: *managerial direction* and *contract* (or reciprocity).

The manner in which managerial direction solves polycentric problems is exemplified by the baseball manager who assigns his players to their positions, decides when to take a pitcher out, when and whom to pinch-hit, when and how far to shift the infield and outfield for a particular batter, etc. The relationships potentially affected by these decisions are in formal mathematical terms of great complexity — and in the practical solution of them a good deal of "intuition" is indispensable.

Many problems of economic management are of a similar nature. Substitution of plastic for aluminum in a component part may produce a paper saving of twenty cents on each unit pro-

duced but involve the disruption of a longstanding relation with a supplier, the possibility of a strike over the necessary changes in piece rates, though the strike might turn out in the long run to be a good thing, etc., etc. In the solution of some economic polycentric problems, recently developed mathematical methods, like those of Leontief, may reduce the necessity to rely on intuition, though they can never eliminate the element of human judgment.<sup>28</sup>

The other method by which polycentric problems are solved is that of contract or a reciprocal adjustment of each center of interest with those with which it interacts. Thus, an economic market can solve the extremely complex problems of allocating resources, "costing" production, and pricing goods. Whenever the literature of socialism actually deals seriously with those problems the only solution found is the establishment of something akin to a market among the various state enterprises.<sup>29</sup> It is interesting that the best solution even for problems of engineering calculation is often found by deriving an answer from a series of approximations, first from one center of stress, and then from another.<sup>30</sup>

Recently a branch of mathematics known as game theory has been proposed as a method of adjusting adjudication to the solution of what are here called polycentric problems.<sup>31</sup> In essence these proposals convert adjudication into a kind of contractual game, in principle much like the classical solution already mentioned for dividing an estate equally between two sons. Each party draws up a priority list indicating his order of preference for the various possible solutions of the controversy; mathematical methods are then used to produce the "optimum" solution. The fault of this procedure is that it solves a polycentric problem only by grossly simplifying and distorting it. The priority list, for example, indicates one party's preferences as *A, D, E, B*; it does not indicate that if he gets one tenth of *A* he might be willing to move *E* ahead of *D*, etc.

It is important to note that the majority principle is quite incapable of solving polycentric problems. A baseball manager surveying in his mind all the possible ways of deploying the talent

<sup>28</sup> [See Leontief, *Input-Output Economics*, SCIENTIFIC AM., Oct. 1951, at 15. See also W. LEONTIEF, H.B. CHENERY, P.G. CLARK, J.S. DUSENBERRY, A.R. FERGUSON, A.P. GROSSE, R.N. GROSSE, M. HOLZMAN, W. IZARD & H. KISTIN, *STUDIES IN THE STRUCTURE OF THE AMERICAN ECONOMY* (1953).]

<sup>29</sup> See O. LANGE & F.M. TAYLOR, *ON THE ECONOMIC THEORY OF SOCIALISM* ([B. Lippincott ed.] 1938).

<sup>30</sup> [See M. POLANYI, *supra* note 26, at 173-74].

<sup>31</sup> See R.B. BRAITHWAITE, *THEORY OF GAMES AS A TOOL FOR THE MORAL PHILOSOPHER* [53-54 (1955)].

at his disposal may come up with the optimum solution; it would only be by accident that such a solution could result from a vote of the players or fans. Indeed, where voting is by the majority principle, the choice must be limited to two alternatives, say, Solution *X* or *Y*, and most of the problems would have to be solved before a vote could be taken. But even when voting methods are modified, polycentric problems remain beyond the reach of anything like an election. Even if the choices are limited to three and voters are asked to list Solutions *X*, *Y*, and *Z* in the order of their preference, the vote may result in a circle of priorities and thus yield no solution at all, either good or bad.

On the other hand, polycentric problems can often be solved, at least after a measure, by parliamentary methods which include an element of contract in the form of the political "deal." The parties in interest — or, more realistically, the parties most obviously concerned — are called together at a legislative hearing or in a conference with legislative leaders and "an accommodation of interests" is worked out. I suggest that we need a philosophy of the "political deal" that will discern its proper uses from its abuses. I believe the concept of the polycentric problem could help in drawing the line.

If we survey the whole field of adjudication and ask ourselves where the solution of polycentric problems by adjudication has most often been attempted, the answer is: in the field of administrative law. The instinct for giving the affected citizen his "day in court" pulls powerfully toward casting exercises of governmental power in the mold of adjudication, however inappropriate that mold may turn out to be. It is interesting to observe, however, that during World War II the agencies charged with allocative tasks did not attempt to follow the forms of adjudication. The War Labor Board proceeded after the pattern of tripartite arbitration, but it was theoretically barred from raising wages to influence the flow of labor, the allocative function in this case being assigned to the War Manpower Commission, which was not an adjudicative body. The Office of Price Administration and the War Production Board, vast as their powers were, did not pretend to act adjudicatively, except in trying alleged violations.

Generally speaking, it may be said that problems in the allocation of economic resources present too strong a polycentric aspect to be suitable for adjudication. Thus, a proposal made in England after World War II that scarce newspaper print be allocated by jury verdict could hardly have been the product of serious reflection. In a somewhat different category is the proposal by James B. Conant that a "quasi-judicial" procedure be

used in allocating government funds among competing projects of scientific research. Obviously Dr. Conant has given serious thought to this question, and he seeks some procedure which will avoid the compromises that so often result in no project's getting enough money to make it effective. His desire to preserve the integrity of adjudication is shown by the fact that he suggests, "If there is no [competing project], some technical expert should be appointed to speak on behalf of the taxpayer *against* the proposed research . . . ." <sup>32</sup> Yet when one considers the nature of the problem of allocation, one wonders whether the "adjudication" here proposed could be that in anything but name. In allocating \$100 million for scientific research it is never a case of Project *A* v. Project *B*, but rather of Project *A* v. Project *B* v. Project *C* v. Project *D* . . . bearing in mind that Project *Q* may be an alternative to Project *B*, while Project *M* supplements it, and that Project *R* may seek the same objective as Project *C* by a cheaper method, though one less certain to succeed, etc.

The final question to be addressed is this: When an attempt is made to deal by adjudicative forms with a problem that is essentially polycentric, what happens? As I see it, three things can happen, sometimes all at once. *First*, the adjudicative solution may fail. Unexpected repercussions make the decision unworkable; it is ignored, withdrawn, or modified, sometimes repeatedly. *Second*, the purported arbiter ignores judicial proprieties — he "tries out" various solutions in posthearing conferences, consults parties not represented at the hearings, guesses at facts not proved and not properly matters for anything like judicial notice. *Third*, instead of accommodating his procedures to the nature of the problem he confronts, he may reformulate the problem so as to make it amenable to solution through adjudicative procedures.

Only the last of these needs illustration. Suppose it is agreed that an employer's control over promotions shall be subject to review through arbitration. Now obviously an arbitrator cannot decide whether when Jones was made a Machinist Class A there was someone else more deserving in the plant, or whether, in view of Jones' age, it would have been better to put him in another job with comparable pay. This is the kind of allocative problem for which adjudication is utterly unsuited. There are, however, two ways of obtaining a workable control over promotions through arbitration. One of these is through the posting of jobs; when a job is vacant, interested parties may apply for promotion into it.

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<sup>32</sup> [J.B. CONANT, SCIENCE AND COMMON SENSE 337 (1951). The sentence in the text is a slight misquotation; the original reads, "If there are no contrary arguments, some technical expert . . . ."]

At the hearing, only those who have made application are entitled to be considered, and of course only the posted job is in issue. Here the problem is simplified in advance to the point where it can be arbitrated, though not without difficulty, particularly in the form of endless arguments as to whether there was in fact a vacancy that ought to have been posted, and whether a claimant filed his application on time and in the proper form, etc. The other way of accommodating the problem to arbitration is for the arbitrator to determine not who should be promoted but who *has* been promoted. That is, the contract contains certain "job descriptions" with the appropriate rate for each; the claimant asserts that he is in fact doing the work of a Machinist A, though he is still assigned the pay and title of a Machinist B. The controversy has two parties — the company and the claimant as represented by the union — and a single factual issue, Is the claimant in fact doing the work of a Machinist A?

In practice the procedure of applying for appointment to posted jobs will normally be prescribed in the contract itself, so that the terms of the agreement keep the arbitrator's function with respect to promotions within manageable limits. The other method of making feasible a control of promotions through arbitration will normally result from the arbitrator's own perception of the limitations of his role. The contract may simply contain a schedule of job rates and job classifications and a general clause stating that "discharges, promotions, and layoffs shall be subject to the grievance procedure." If the arbitrator were to construe such a contract to give him a general supervision over promotions, he would embark himself upon managerial tasks wholly unsuited to solution by any arbitral procedure. An instinct toward preserving the integrity of his role will move him, therefore, to construe the contract in the manner already indicated, so that he avoids any responsibility with respect to the assignment of duties and merely decides whether the duties actually assigned make appropriate the classification assigned by the company to the complaining employee.

Let me take another example, where my interpretation of what has occurred may or may not be correct. The FCC early established the policy that generally applicants for radio or television channels must propose a well-rounded, general program. In rural areas, where only one or two channels are available for local receivers, this policy can be justified on grounds having nothing to do with the inappropriateness of using adjudication for allocative purposes. But in many areas there are available five to ten television channels and many more radio channels. What one

would expect here would be the development of specialized markets: one station catering to the sports fan, another to the opera lover, etc. In England the BBC has three kinds of programs, ranging from lowbrow, to middlebrow, to highbrow. In this country some development of specialization has occurred — despite the FCC — in a general distinction in the appeal of AM and FM radio. Yet contests for television channels today are still competitions among applicants each of whom promises the most inclusive, “well-rounded” program, each undertaking to satisfy more incompatible tastes than his rivals. Is not this phenomenon to be explained by the fact that it is sensed by all, the FCC and the applicants alike, that the whole adjudicative procedure would break down if one applicant promised to satisfy one market, another a different market? In such a case, the meaning of the applicant’s participation through proofs and arguments would be destroyed because (1) there would be no real joinder of issues and (2) the FCC would have to consider whether parties not present at the hearings were not already satisfying one or more of the markets proposed to be opened. To preserve some substance for the form of adjudication you have to judge pumpkins against pumpkins, not pumpkins against cucumbers, especially when there are some relevant cucumbers not entered in the show.

In closing this discussion of polycentricity, it will be well to caution against two possible misunderstandings. The suggestion that polycentric problems are often solved by a kind of “managerial intuition” should not be taken to imply that it is an invariable characteristic of polycentric problems that they resist rational solution. There are rational principles for building bridges of structural steel. But there is no rational principle which states, for example, that the angle between girder *A* and girder *B* must always be 45 degrees. This depends on the bridge as a whole. One cannot construct a bridge by conducting successive separate arguments concerning the proper angle for every pair of intersecting girders. One must deal with the whole structure.

Finally, the fact that an adjudicative decision affects and enters into a polycentric relationship does not of itself mean that the adjudicative tribunal is moving out of its proper sphere. On the contrary, there is no better illustration of a polycentric relationship than an economic market, and yet the laying down of rules that will make a market function properly is one for which adjudication is generally well suited. The working out of our common law of contracts case by case has proceeded through adjudication, yet the basic principle underlying the rules thus developed is that they should promote the free exchange of goods in a poly-

centric market. The court gets into difficulty, not when it lays down rules about contracting, but when it attempts to write contracts.

### 3. *Is the Proper Province of Adjudication Limited to the Declaration of Rights and Duties?*

I have already pointed out that an attempt is often made to distinguish adjudication by saying that the decisions of courts declare or create rights and duties, while the decisions of executives and administrators do not. Does this formulation state a distinct limit of adjudication, different from those just discussed? I do not believe so, or rather, I believe this formulation of the limits of adjudication derives from considerations very closely allied to those analyzed in the discussion of polycentric tasks.

A right is a demand founded on a principle — a principle regarded as appropriately controlling the relations of two parties. Now it is characteristic of a polycentric relationship that the relations of individual members to one another are not controlled by principles peculiar to those relations, just as it is impossible to build a bridge by establishing distinct principles governing the angle of every pair of girders. So in a baseball team, no one has a "right" to left field, or at least, no one ought to.

The transformation by which economic relations that ought to remain flexible tend to crystallize into "rights" is, in effect, the same process I attempted to describe when I spoke of cases where adjudication, instead of accommodating its forms to a polycentric problem, has accommodated the problem to its forms. Our railways are taken as a prime example of a field of human relations penetrated by inappropriate "rights" that interfere with efficiency. It is said by the railways themselves that this development began during World War I when a government, then unused to managerial tasks, undertook to run the railways after its accustomed forms and converted every managerial problem into something suitable for decision by adjudication.<sup>33</sup>

### 4. *Is It a Significant Statement of the Proper Province of Adjudication To Say That Courts Cannot By and Large Undertake an "Affirmative" Direction of Affairs?*

It is often said that courts cannot undertake the responsibility for an affirmative direction of affairs. Miss Johanna Wagner can be restrained from singing for Mr. Gye; she cannot be compelled to sing for Mr. Lumley — the British courts cannot go into the theatre business.<sup>34</sup>

<sup>33</sup> See [Executive Committee, Bureau of Information of the Eastern Railways,] *Wages and Labor Relations in the Railway Industry 1900-1941*, at 55-60 [(n.d.)].

<sup>34</sup> [Lumley v. Wagner, 1 DeG. M. & G. 604, 42 Eng. Rep. 687 (Ch. 1852),

Once again, I believe that this is merely a reformulation of the limitations discussed in connection with polycentric problems. What we call "affirmative" direction involves a summoning and ordering of individual and collective human energies. Polanyi reminds us that it is a characteristic of living creatures that they can deal with polycentric problems, indeed, this is the nature of all "creative" actions.<sup>35</sup> This is apparent when we think of the artist, the architect, the painter. But on the lowest level we see life struggling to survive by solving polycentric problems when the ameba restlessly readjusts its pseudopods in the manner most appropriate to its changing liquid environment.

It has often been remarked that rights in rem (that is, rights against the world generally, such as the right not to be struck) are invariably "negative." What this means is that the law can clear the way for creative acts by restraining certain obviously destructive ones; it cannot effect the reordering that is involved in acts of creation.

Before leaving this problem of the distinction between the "negative" and the "affirmative," I should like to record my conviction that one of the most unsatisfactory chapters in legal analysis is that dealing with this distinction, as, for example, in the well-known distinction between malfeasance and nonfeasance and in assertions to the effect that "an affirmative is easier to prove" and that the party seeking to establish an affirmative proposition therefore bears the burden of proof. Discussions of problems like these often proceed as if reality presented itself to us already bearing the labels *plus* or *minus*. That this is not the case can readily be seen if we remember that we can always convert a negative into an affirmative by adding another "not" — Miss Wagner can be ordered to cease not singing. The distinction between what we think of as affirmative and negative conduct is something deeper than a grammatical sign.

### VIII. MIXED, PARASITIC, AND PERVERTED FORMS OF SOCIAL ORDER INVOLVING ADJUDICATION

#### 1. *Introduction*

This concluding section will be sketchy and suggestive, without any pretense to dealing exhaustively with the problems it raises.

It may be well to warn again against the assumption that every mixed or "impure" form of adjudication is here condemned. In

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reprinted in L.L. FULLER & M.A. EISENBERG, BASIC CONTRACT LAW 783 (3d ed. 1972).]

<sup>35</sup> [M. POLANYI, *supra* note 26, at 176.]

the previous discussion of tripartite arbitration, I tried to show how useful this form might be, at the same time calling attention to the dangers contained in it and to the possibilities of its abuse.

When I speak of a form of order as being parasitic, I mean merely that, although it seems to possess an original strength of its own, it in fact draws its moral sustenance from another form of order. In labeling it "parasitic," I intend no more condemnation than when a botanist calls a certain fungus "parasitic." Just as, from the standpoint of human interest, there are good and bad fungi, so parasitic forms of order may be good or bad.

## 2. *Mixed Forms of Social Ordering Involving Adjudication and Contract*

*a. Adjudication and Mediation.* — During World War II the War Labor Board undertook to revise the internal structure of wages in a number of industries. This polycentric task could not have been accomplished by adjudication in its usual forms. Instead, following the hearing, a member of the Board met alternately with representatives first of industry, then of the union, and sounded them out on various changes in the wage scale. The result was a mediated contract negotiated under the threat of an exercise of adjudicative functions. For rather obvious reasons, this is a dangerous procedure, requiring the skill of a George Taylor and the capacity to make a rather uninhibited use of public power that characterizes a war economy.<sup>36</sup> In peacetimes functions of this sort are usually exercised by a kind of industrial "czar." The fact that persons occupying this sort of role normally start as arbitrators has produced a very dangerous confusion. It has misled many uninformed persons into believing that "good arbitration" involves the formless exercise of a kind of wisdom-directed personal power. The fact is that these "czars" gradually drift into a kind of charismatic leadership, the peculiar magic of which is valid only within a limited context. Even within that context the business of "playing god" can be very dangerous, as experience has often demonstrated.

*b. Tripartite Arbitration.* — This mixed form has already been discussed at considerable length in other connections.

*c. Obligations to Negotiate Under the Threat of an Exercise of Adjudicative Powers.* — A complex long term supply contract provides for a renegotiation of the price from time to time and, failing agreement, for a determination of the price through arbitration. Here adjudication and contract reciprocally support one another. Parties desirous of entering a contract would hardly stipulate

<sup>36</sup> [See G.W. Taylor, *Effectuating the Labor Contract Through Arbitration*, Address Before the National Academy of Arbitrators (January 14, 1949).]

that on their failure to agree the whole contract should be written by an arbitrator. The function assigned to the arbitrator has to take place within the framework of an agreement, most of the terms of which are fixed. On the other hand, without the threat of arbitration it might be difficult for the parties to reach agreement on the terms left for periodic renegotiation.

In practice the arbitration clause in such a contract is included in the fervent hope that it will not have to be used; it is intended as a spur toward a negotiated agreement. On the other hand, the substance of the negotiations can scarcely escape being influenced by the parties' conceptions of what a resort to arbitration would probably produce. Expectations as to the way in which an arbitrator would view the case affect the relative bargaining power of the parties, and hence the outcome of the negotiations. This influence may detract from a full realization of the gains of reciprocity. On the other hand, if the arbitrator's powers are invoked he may try to decide the case by asking how the negotiations would have come out had the parties been more reasonable toward each other. Thus, each side of the arrangement — that is, the arbitrator on one side, the parties on the other — is likely to borrow its standards from the other, something generally undesirable and working against a fully effective use of either form of order, contract or adjudication.

This defect in the arrangement may become more serious when the parties have left for negotiated settlement something more complex than price, say, a seniority or vacation clause. Here the parties will realize that if the arbitrator's powers are invoked he will in all likelihood base his decision on "standard" or "typical" practice, simply because there is no other way of giving it a semblance of rationality. This anticipation of the results of arbitration strengthens the hand of that party who has the most to gain from an adoption of "standard" procedure, even though the needs of both parties might be better met by some deviation from that procedure.

### *3. Parasitic and Perverted Forms of Adjudication*

*a. Adjudication Parasitic on Contract.* — Since the participation of litigants in adjudication is limited to making an appeal to the arbiter's reason, it is of the essence that adjudication be based on "rational" standards in the senses previously discussed. Arbitrations to set wages and prices can under some circumstances derive their "rationality" from a market, as in the following cases: (1) In times of emergency, where the task of the arbitrator is to preserve normal relationships that threaten to be disturbed by the temporary crisis. Here the arbitrator's task becomes increas-

ingly "irrational" as the normal pattern recedes in time and becomes increasingly inappropriate. (2) For a segment of industry, where the arbitrator's task is to preserve the "normal" relationship of this segment to industry as a whole. (3) For a single nation which is strongly dependent upon the world market.

The relative success of such adjudicative ventures has led to much confusion. We are told to follow the "middle way of Sweden," or to outlaw the strike by making all wages subject to arbitration, or to carry into peacetimes the controls that were so successful in time of war, etc. These well-intentioned proposals can only arise because those who make them do not see that the adjudicative process they praise is parasitic upon a regime of contract.

*b. Contract Parasitic on Adjudication.*—The leaders of a union privately agree with an employer on a five-cent-an-hour increase for the members of the union. Though the union leaders know the company's financial condition will not permit it to absorb a greater increase, they are doubtful of their ability to "sell" the five-cent settlement to their membership. Accordingly, an "arbitration" is arranged. The arbitrator is told that he is to render an award of five cents. Extended hearings are held during which the unsuspecting union members have the satisfaction of hearing their representatives argue vigorously that they are entitled to at least twenty cents an hour. The arbitrator "deliberates" for a month and renders an award of five cents an hour. The members of the union reluctantly acquiesce in the advice of their leaders that this is the most they could get with the aid of the best legal talent in town.

Here one form of order, contract, has not the strength to stand on its own feet; it has to be given an infusion from a phony arbitration. It seems to me that the term "parasitic" is here wholly apt, and I would not hesitate to add the designation "perverted." Plainly, if *all* awards were "fixed," casting a contract in the form of an adjudication would accomplish nothing. Those who take advantage of the phony arbitration are able to do so only because their example is not generally followed. One is reminded of Schopenhauer's remark that the prostitute owes her bargaining power to the restraint of virtuous women.

It should be noted that the case I am speaking of (and such cases do in fact occur) involves an arbitrator who derives his power from an agreement of the litigants. The moot or "fixed" case before a court presents a different set of problems. Historically court procedure has often been employed to assure the legal effect of an agreement. "Fines" and "recoveries," two modes for conveying land in England, were based upon an innocently

“collusive” suit. Developments of this sort seem in retrospect quite unobjectionable and even wholesome. The procedure now available in Reno and other places for converting an agreement into a legally effective divorce has not yet acquired the same shielding patina of history. In an interesting little book by a Soviet judge, the author tells of discovering that there were an extraordinary number of suits brought before him by consignees against railways claiming shortages.<sup>37</sup> In all of these cases the judgment was for the railway, on the ground that the alleged “shortage” was simply the shrinkage that would naturally occur in certain products in course of shipment. When the judge asked the plaintiffs why they persisted in bringing such suits, the answer was, “Well, in case any questions were raised about the amount we put into inventory, we thought we ought to have the protection of a court decree.” I find in this little incident an eloquent though indirect tribute to commercial adjudication in Russia. If the commercial courts were not by and large “on the level,” this mild abuse of judicial procedure would not have served any purpose.

Happily, the “fixed” labor award in the crass form I related is a rarity. In fairness, we must recognize further that the admixture of contractual elements in an adjudicative process is a matter of degree. Even in the most formal and adversary presentation an arbiter can often discern some indication of what the parties would regard as an acceptable settlement simply from the relative emphasis placed on the various issues and arguments. This discreet reading between the lines, far from being a perversion of adjudication, serves to enhance its efficacy. But the fact that all human relations are tinctured with a slight element of dissimulation is no reason to elevate dissimulation to the level of principle.

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<sup>37</sup> G. IVANOV, NOTES OF A PEOPLE'S JUDGE 55-56 (1950).