APPEAL

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This article is a survey of the literature on appeal, emphasizing its significance for political regimes rather than for individual litigants.

I. INTRODUCTION

Appeal has usually been viewed "from the bottom up," i.e., from the perspective of the losing party at trial. Its principal purpose is then to protect the loser against an arbitrary, capricious, or mistaken decision by the trial judge (Traynor, 1970; Pound, 1941). Appeal thus becomes a subtopic within due process and a mode of vindicating the rights of individuals (Cappelletti and Tallon, 1973). Alternatively, appeal is viewed as providing the loser at trial with certain psychic benefits, such as catharsis.

A second conventional image of appeal is essentially lateral (*Yale Law Journal*, 1978b; Shapiro, 1970). Appellate courts are assigned responsibility for ensuring uniformity among subordinate courts. Most of the literature on appeals courts focuses on these functions of correcting error and imposing uniformity (Carrington et al., 1976; Advisory Council for Appellate Justice, 1975). From this perspective the decisions of appellate courts as creations or announcements of law are incorporated into the various substantive topics—torts, utilities regulation, etc.—along with other announcements of uniform law, such as statutes (Leflar, 1974b).

Recognition that appellate courts announce or make law stimulates a third approach to appeal. Most of the literature on judicial decision making and legal reasoning (except that small portion on fact-finding) is in reality a literature about appeal. It commonly proceeds by analysis, criticism, and citation of appellate decisions. (For reasons we will note later such focus is less characteristic of the older English than of the older American literature, but recent English scholarship resembles American.) Here appeal becomes an almost incidental dimension of the debate about proper modes of legal reasoning and discourse. Some of that debate, of course, is framed as a discussion of appellate advocacy (*Harvard Law Review*, 1951;

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Prettyman, 1953; Schaefer, 1956; Tate, 1965; Denecke et al., 1972; Goodrich, 1967; Harlan, 1955; Wiener, 1950, 1961; Charpentier, 1968), or of the thought processes of appellate judges (Medina, 1961; Llewellyn, 1960; Howard, 1973b), or of the institutional decision-making processes and internal operating procedures of particular appellate courts (Schick, 1970; Smith, 1975; Vincent, 1973; National Center for State Courts, 1973; Leflar, 1976; Federal Judicial Center, 1973; Cohen, 1951; McConkie, 1976; Howard, 1973a; U.S. Commission, 1975; Lilly, 1974; Advisory Council for Appellate Justice, 1975; Thompson and Wollaston, 1969; American Bar Association, 1977, 1961, 1942; American Judicature Society, 1968), or of the extent to which *stare decisis* influences appellate decisions (Stone, 1971; *Yale Law Journal*, 1978b).

Indeed, most legal writing on appeal is contained in general treatises on procedure and either is unconcerned with the purposes of appeal or subsumes them under the general purposes of procedure (Stalev, 1974; Solus and Perrot, 1961; Herzog and Weser, 1967; Karlen, 1978; Cohn, 1976; Cappelletti and Perillo, 1965; Banerjee, 1963; Kucherov, 1966; Berman, 1966). Much of the descriptive material on the basic organization and jurisdiction of appellate courts must be sifted out of general works on comparative law and national legal systems (Zweigert and Kotz, 1977; David and Brierley, 1968; Rubin and Cotran, 1970; Noda, 1976; Wigmore, 1969; Conquest, 1968; Cappelletti et al., 1967; Jackson, 1972; Council of Europe, 1976; Ehrmann, 1976; Hazard, 1969; Berman, 1963) and on the judicial systems of the American states (Glick and Vines, 1973; Council of State Governments, 1978). Few works deal with appellate courts as such (Karlen, 1963; Hazard, 1965; Howard and Goldman, 1978). There are, of course, a great many studies of the highest appellate tribunals of various nations (e.g., Blom-Cooper, 1972; Stevens, 1978; Barry, 1969) and of the American states (Council of State Governments, 1950; Canon and Jaros, 1969; Glick, 1971; Kagan et al., 1977, 1978; McConkie, 1976). No attempt is made here to cover the vast body of materials on the United States Supreme Court except where they bear specifically on appeal as a distinct legal phenomenon. One recent instance of an attempt to deal with a supreme court explicitly in terms of the nature of final appeals is Laskin (1975). There have been a few studies of individual state supreme courts that shed some light on the nature of appeal (Morris, 1975; Beiser, 1974).

Recent concerns with delay in the courts have generated studies aimed at speeding up the appellate process. These tend

to view efficiency as an end in itself and evidence little concern for the broader purposes of appeal (Parker, 1950; Meador, 1973, 1974, 1975; Kaufman, 1974). The National Center for State Courts, the Federal Judicial Center, and the Center for Judicial Administration at New York University are engaged in continuing research on "judicial administration" and should be consulted for their most recent studies.

From all of these perspectives appeal is the handmaiden of certain fundamental legal values: it seeks to ensure that the law shall be uniform, impersonal, impartial, principled, and clearly elaborated (*Yale Law Journal*, 1978a). None of these perspectives is incorrect. It is not the purpose of this study to challenge conventional wisdom but to add another view and focus on the literature that illuminates it.

Suppose we look at appeal not from the bottom up, or laterally, or in terms of service to the cause of legal discourse, but from the top down (Shapiro, 1975). Appeal is an expensive legal mechanism. Why should any regime be willing to pay its cost? Indeed, why is it that almost all regimes do so? There are two conventional answers. First, the regime itself may have interests in ensuring that losers at trial enjoy the catharsis of an appeal and perceive it as affording an opportunity for getting fair treatment. Second, the regime may also want to promote legal uniformity. It could even be argued that most regimes wish to improve the quality of legal discourse since they can presumably pursue their goals more effectively through clear and consistent legal rules than through confused, conflicting judicial decisions.

Nevertheless, the pervasiveness of appellate processes makes these rationales suspect. Appeal has flourished in regimes that have displayed little or no respect for individual rights or even for the rule of law in any conventional sense. Frequently, moreover, appeal not only increases the arbitrariness and partiality in the legal system but is actually designed to do so. For appeal often culminates in the exercise of a highly particularistic pardoning power, or something like it, rather than a decision on the merits in the narrower sense. Especially where appeal is to the military overlord, patron, or sovereign, it is a process of appealing *to* favor rather than of correcting the favor of the trial judge.

II. INTERMEDIATE APPELLATE COURTS

Quite apart from these seeming anomalies, there is the phenomenon of intermediate appellate courts. If the sole

function of appeal were to correct biased or arbitrary trial court behavior, then one appeal would be sufficient. Yet most appellate structures have a number of tiers culminating in the highest political authority. Their existence points to several characteristics of appeal. First, appeal is not designed solely to correct errors made by trial courts. The third opinion rendered by the Supreme Court is superfluous in checking the arbitrariness of trial judges: surely it is no more likely to be just than the judgment rendered by the first appellate court.

One response might be that a highest appeals court is needed to ensure uniformity of law. In Canada, for instance, appeals from the administrative decisions of federal agencies long went to the provincial supreme courts, with only very limited possibilities for further appeal to the national Supreme Court. A new federal court has now been created to handle such appeals, apparently in order to achieve greater uniformity in administrative law (Lemieux and Vallieres, 1976; cf. Bowen, 1977). In this instance, uniformity was sought not by imposing a single tribunal over lower appellate courts but by concentrating all appeals within a substantive area in a single court. But where the volume of appeals is high or communications are difficult, such concentration is impossible, and the next best thing is the superimposition of a single court at a higher level.

The American experience with intermediate appellate courts probably reveals most clearly the lawmaking facet of appeals. The federal judiciary and that of many states contains multiple, geographically dispersed appellate courts under a supreme court (*Yale Law Journal*, 1978a, 1978b; Magruder, 1958). There is generally a first appeal "of right," followed by an application for a writ of certiorari to a supreme court that is free to choose which appeals it will hear (Roehner and Roehner, 1953; Stern, 1953; Baum, 1976; Traynor, 1957; Taft, 1953). Under such an arrangement the supreme court is almost a legislative body. It may choose to hear a few cases each year in which it is only correcting the error of an intermediate court of appeals. But for the most part supreme courts wield their certiorari jurisdiction consciously and openly to decide questions of law over which lower appellate courts are in conflict or that require major judicial lawmaking (Martin, 1977; Herbert, 1976; Johnedis, 1975; Jacobson and Schroeder, 1977; Groot, 1971). Intermediate courts of appeal correct the individual injustices that occur in trial courts (Wilson, 1976; Hopkins, 1974, 1975; Gustafson, 1971). The supreme court

reserves its time for making new law (Gower, 1973); any notion of appeal as error correction is highly attenuated. Indeed, the fact that there has been a trial is largely beside the point: the supreme court surveys the wide range of lawmaking opportunities offered by its huge docket and selects only those it wishes to pursue.

The recent proposals for yet another level of appeal between the federal courts of appeal and the Supreme Court reveal most clearly both this lawmaking function and the threat to the legitimacy of appellate courts when they are too divorced from error correction (*Yale Law Journal*, 1978b; Jacobson and Schroeder, 1977; Hufstedler, 1969; *Villanova Law Review*, 1977; cf. Levin and Hellman, 1976). We have already noted that the superimposition of a single supreme court over multiple appellate courts is justified partly in terms of ensuring uniform judicial interpretations. This may be viewed as a form of error correction. If one court of appeal says the law is X and another says it is Y, then one has made an error that appeal to the supreme court will correct. Alternatively, it might be argued that if two courts of appeal disagree on the meaning of the law, that law must be unclear, and appeal to a supreme court is a request for clarification. Supreme courts thrive on this kind of ambiguity.

What happens, then, if we insert another level of appellate court between the courts of appeal and the Supreme Court and openly proclaim that its purpose is to resolve conflicts among the courts of appeal in order to relieve the Supreme Court of some of its enormous caseload? But relieve it to do what? Surely not to correct the random errors of trial courts. Two other layers of appellate judges who are just as qualified as the Justices will perform that function. Nor can the justification be that ambiguous form of error correction we call ensuring uniformity among geographically dispersed appellate courts. The new single appellate court will do that. Clearly, the Supreme Court will be freed to engage in lawmaking. The grant of certiorari jurisdiction to the Supreme Court was the first major step in removing it from error correction. The creation of another level of appellate court to ensure uniformity would be a second major step. If that course were taken, and there were increasing dissatisfaction with the law the Supreme Court made, what would we lose by abolishing it altogether? We would not lose error correction. Nor would we lose uniformity in the interpretation of federal law.

III. LOYALTY TO THE TOP

We can, however, begin to specify what we would lose. Two lines of analysis help to answer this question and, in the process, suggest a great deal about the fundamental political functions of appeal. The first is the history of state supreme courts (Kagan et al., 1977, 1978; see also Allen and Taylor, 1977; Wilson, 1976; Martin, 1977). The caseloads of American state supreme courts have increased dramatically. Most states originally constructed a system of appeals in which cases moved directly from trial courts to the supreme court. Faced with a growing supreme court workload, more and more states have created a two-tier system, with appeal as of right to a court of appeals and further appeal at the discretion of the supreme court. A recurrent characteristic of this process during the hundred years or so that it took was the reluctance of the state legislatures to adopt such an obvious solution. Throughout this long struggle, relatively little is heard about the need to attain uniformity in appellate lawmaking (even when the state is so large that two or more appellate courts at the same intermediate level will be needed) and a great deal about the right of every citizen to take his appeal all the way to the top. Of course, the mere existence of intermediate courts inhibits appeal to the Supreme Court because of the time and money required by the additional proceeding. But it is not just the creation of the courts of appeal that is disturbing. It is the inevitable concomitant: the state supreme court must be given discretion to limit appeals if it is to reduce its caseload. The concern is expressed from the typical bottom-up perspective that we noted initially, i.e., from the perspective of the loser at trial. But the actual concern appears to be quite different. Perhaps this can best be seen by juxtaposing the oft-repeated anxieties of American legislators with some peculiar practices of Russian and Chinese emperors.

In Imperial China the most meticulous appeals procedures were reserved for those defendants who had been sentenced to death, a penalty imposed for a very wide range of offenses. The case file proceeded upward from the trial court to provincial appeals courts and eventually to the Board of Punishments at the capital. The accused was shipped along with the file from prison to prison, although, barring exceptional circumstances, appeal was on the record and not by trial de novo. It appears that appellate courts never reversed the verdict but only adjusted the penalty. Reduction of the death penalty had to be performed or confirmed at the capital. If the original penalty

was upheld, the defendant entered a period in limbo that might last several years, during which he was eligible for imperial clemency. A personal representative of the emperor held parades of the prisoners and granted clemency in a manner that appeared to them to be totally random and arbitrary. Prisoners granted complete clemency were immediately freed, but a defendant unlucky enough to be passed over a number of times without being chosen for clemency was finally condemned. The unfortunates were then shipped back down the appellate chain and executed by the local tribunal that had convicted them (Bodde and Morris, 1967; van der Sprenkel, 1962).

In eighteenth- and early-nineteenth-century Russia the czars established what looked like a Westernized court system, with trial courts and an appellate ladder leading to the capital. The system was marked by corruption at all levels. But its most distinctive feature was the direct intervention by the Czar and other members of the high nobility in appellate proceedings. Important appeals were almost always resolved through such intervention, and appellants devoted far more energy to persuading or bribing high personages to influence the court than they spent on legal formalities. This practice persisted even after the Russian courts were reformed in the 1850s and 1860s (Wortman, 1976).

What American legislators, Chinese emperors, and Russian czars and nobility have in common is surely not their sense of due process or even their concern that appeals correct errors. They are focusing on quite another function of appeal—its use as a form of patronage. More importantly, appeal all the way to the top, and intervention at the top that is perceived as benevolent by the successful appellant, are powerful means of fostering loyalty to the central regime. Just as the Chinese procedure associates the emperor with clemency and identifies the local bureaucrat with execution, so the Iowa farmer is wedded to his state government by pursuing his appeal to the state capital. Such an identification is found even in regimes like that of the czar, in which appeal to the top not only fails to ensure uniformity but actually promotes arbitrary and particularized judgments. This is one of the reasons that appeal is almost invariably an attribute of ultimate "sovereignty," although the state may care little for the rule of law or the rights of individuals.

Many regimes seek to depict the sovereign as the ultimate font of justice and mercy. The Norman and Angevin kings and

their councils, like many tribal chiefs, personally administered justice at first instance as well as on appeal (Stenton, 1964; Abel, 1973; Gluckman, 1955). Appeal can therefore be reexamined in the light of the question—to what extent do the mechanisms of appeal contribute to the perceived legitimacy of the regime?—rather than in terms of the conventional question—to what extent does appeal correct the wrongs done by trial courts?

In this context the debate over appeal on the record versus appeal by trial de novo[1] takes on a significance somewhat different from that noted later in this paper. Trial de novo increases the direct personal contact between the appellant and the higher reaches of the regime. Of course, there is no alternative to trial de novo in nonliterate societies, where necessity mandates what legitimation urges (Rubin and Cotran, 1970). Literate societies that lose this means of eliciting loyalty when they move to appeal on the record may preserve an informal, and often "corrupt," personal route to the top, as we noted in nineteenth-century Russia.

In this respect appeal by trial de novo before the highest authority and initial trial before that authority become almost indistinguishable. Both declare the authority to be the font of justice. A court that defines itself as the personal instrument of

[1] As used in this paper, the terms "appeal by trial de novo" and "appeal on the record" are ideal types. In reality the following spectrum may be observed. (1) The appellate court conducts an entirely new trial, taking no account of the evidence offered in the court of first instance. (2) The trial court record is submitted in the appellate proceeding, but the parties are allowed wide latitude in offering evidence—both that submitted below and new evidence—and the appellate court makes an independent assessment of the whole body of evidence. (3) The record is submitted and opportunities to present evidence, whether or not it has been offered below, are circumscribed. (4) No new evidence can be presented, and though the appeals court reviews the trial record, it displays great deference to trial court findings of fact. (5) The appellate court sees only the record below and may not substitute its own findings of fact for those of the trier of fact (usually a jury); but it may remand for a retrial if it concludes that the verdict was not justified by the weight of the evidence or rested on a clearly erroneous finding. (6) The appeal addresses only questions of law and not factual issues.

Each of these six categories is itself a composite of practices drawn from various legal systems, and some systems combine elements from various categories. For instance, in some socialist states a proceeding resembling category 2 may conclude that the trial court made incorrect factual findings, and this conclusion will then trigger a new trial either in a court of first instance or by the appellate court itself. In many civil law states, the first appeal falls in categories 2 or 3 and appeal to the highest court in 6. In the United States, category 1 is dwindling, 2 is very rarely encountered, 3 is triggered only by unusual circumstances, 4 is common where the trial was before a judge alone and 5 where trial was by jury, and 6 (or something halfway between 5 and 6) is common in appeals from administrative agency decisions and many appeals to state and federal supreme courts. Here we have drawn a line about the middle of 3 and refer to 1, 2, and half of 3 as appeal by trial de novo and the rest as appeal on the record. See Karlen (n.d.) for a more detailed presentation.

the sovereign often fails to distinguish carefully between an appeal and an initial trial. For instance, although Islamic law theoretically recognizes no appeal, the divan of the Ottoman sultans heard many cases. All were cast as original actions, but many had been tried previously in regional courts without achieving a resolution acceptable to both parties. The forms of procedure bowed to the traditional Islamic prohibition on appeal, but reality was shaped to reflect the Sultan's claim to be the ultimate source of justice in his empire (Shapiro, n.d.).

IV. APPEAL AS DISTRIBUTIVE POLITICS

In short, appeal is one of the many forms of favor, service, or patronage dispensed by a central regime for the purpose of wooing the citizenry. From the regime's point of view, appeal may be far more important as a means of doing favors than of correcting errors, and it may make little difference whether patronage flows via the route of an appeal or an original action.

The very model of such a patronage system is, of course, that evolved in England by the Norman conquerors. The Norman kings did not secure the loyalty of their elites through an appellate ladder but rather by centralizing the whole machinery of justice. The major English trial courts, Kings Bench and Common Pleas, were centralized in the capital, as was the only court of equity, which was personally entrusted to the Chancellor, a high royal official. The Star Chamber, like the divan of the sultan, was one of those special courts of extraordinary jurisdiction and procedure so intimately connected with the sovereign that they take what cases they please, whether or not the dispute involved comes to them fresh or after other ministrations. Even a country as small as England cannot centralize all trials. Nevertheless, the English have managed to maintain the tradition that London is the very font of justice and the locus of all major litigation (Shapiro, 1977).

To put the matter somewhat differently, appeal as a form of patronage is a divisible benefit as well as a public or nondivisible good: it may benefit particular persons or groups as well as serve a general interest in the correction of trial court "errors." The appeals mechanisms of any polity must be examined in terms of the mix of distributive and public goods the regime dispenses and the extent to which it seeks to identify the flow of either benefit with the political leadership.

Recent research on party characteristics in litigation is beginning to throw some light on the distributional aspect of

appeal. Galanter (1974) has suggested that the "haves"—generally institutional litigants with long-term litigational perspectives—are likely to benefit from the judicial process. There are indications that the government is a "have" and does benefit from its ability to manipulate the appellate process in pursuit of long-term strategies. There is contrary evidence, however, that the government wins a higher proportion of appeals than its opponents simply because it makes better choices, in terms of its position's legal merits, of cases to appeal (Carrington, 1974; *Yale Law Journal*, 1978a; Baum, 1976). Federal agencies plan campaigns of appeal in particular circuits (and accept adverse trial judgments in others) in order to shape doctrine to their satisfaction (Shapiro, 1964; *Yale Law Journal*, 1978b; Carrington, 1969a).

Posner and others have argued that the common law distributes legal benefits so as to achieve optimum efficiency—that is, it benefits those who are willing to pay the most. Appeal plays a crucial role in this theory, for whenever a legal rule results in high levels of economic inefficiency, the parties suffering the cost of those inefficiencies have a strong incentive to appeal. There will be more appeals of inefficient than of efficient rules so that the appellate process, driven by the appeals "market," will eventually adopt economically efficient doctrines (Posner, 1977; Landes and Posner, 1975, 1976; Priest, 1977; Rubin, 1977).

V. APPEAL AS POLITICAL INTEGRATION

A variant on the virtually universal use of appeal to the top to enhance the loyalty of citizens to the central regime is its use to integrate overseas empires and federal states. Although, in a sense, this is only what happens in most unitary states writ large, the imperial and federal variants highlight the function of appeal in creating unity rather than doctrinal uniformity. The English, for instance, did not use appeal as a device for promoting national integration. Instead, as we have noted, they centralized the trial courts themselves. An English citizen who wanted the king's justice had to travel to the capital to get it or, alternatively, wait for a king's judge, who came on circuit from the capital and would soon return to it. The centralization of justice in the courts at Westminister and the eyre system was thus a substitute for the elaborate chain of appeals leading from the countryside to the capital that was found in France or China (Shapiro, 1977). The English legal tradition really had only the most rudimentary notion of

appeal. There was no distinct hierarchy of trial and appellate courts. King's Bench and Common Pleas were both trial courts of roughly equivalent jurisdiction, yet King's Bench heard appeals from Common Pleas. Neither of the two "higher" courts of appeal was a distinct entity: the Court of Exchequer Chamber was simply all the judges of the trial courts sitting collegially; the House of Lords, though it heard certain appeals, was essentially a legislative body (Plucknett, 1956; Kiralfy, 1958).

When England acquired a vast overseas empire, however, this system was no longer adequate. True to their tradition, the English did not resort to a separate highest court. But they did convert part of the Privy Council, a rapidly obsolescing executive organ of central government, into a supreme court to hear appeals from the highest colonial courts. Indeed, in its nineteenth-century heyday, the British Empire developed a full hierarchy of territorially dispersed trial courts, regional intermediate appellate courts, and a central supreme court that matched those in other legal traditions (though nothing comparable functioned *within* England) (Finlay, 1974; Herman, 1976). The Privy Council did act to ensure that traditional common-law rules would be uniformly interpreted throughout the Empire. But that was not its principal function, for it often heard cases that turned only on the domestic law or "constitution" of one of the dominions or colonies. Indeed, it sometimes even settled cases involving Islamic law or other bodies of law that were not only peculiar to the colony (or even the tribe or sect of the parties) but also, of course, totally foreign to the common law. As these latter instances clearly show, the Privy Council's primary task was not to advance legal uniformity in the empire but to promote political unity.

Perhaps the most striking evidence of the integrative function of appeals is the proclivity of federal systems for highly developed appellate hierarchies. The strong role typical of the national supreme court in such a system is usually rationalized in terms of the need for uniform interpretation of the national laws within the various subunits, but this is hardly a sufficient explanation. A unitary state also needs uniformity among its subdivisions, yet its supreme court rarely plays so prominent a role in national affairs.

An alternative explanation is that it is not federalism itself that leads to a prominent supreme court but rather the elaborate written constitution that accompanies federalism. This explanation is more satisfactory but still incomplete. For

when we look at what the supreme courts of federal systems actually do, we find that they interpret those portions of the constitution defining federal relationships so as to favor the central government. For one of the many anomalies and compromises that contribute to the successful political integration of a federal state is that its constitution commonly provides that disputes over the respective powers of state and national government shall be decided by the supreme court—a portion of the national government. Of course, the anomaly of authorizing an institution to resolve a contractual dispute to which it is a party is concealed by a great deal of talk about judicial independence and neutral constitutional principles. But this cannot obscure the extent to which the federal supreme court has used its position at the top of the appeals hierarchy to strengthen the hands of the central government (Cappelletti, 1971; Mosler, 1962; Weiler, 1973; McWhinney, 1965).

This integrative role of appeal has achieved new prominence in recent years because we are now experiencing one of its most dramatic exercises. The European Economic Community was born of the post-World War II urge toward international integration. But political integration has been slow for a number of reasons, the most important of which may be political parties. Although it is not absolutely clear which way the causal arrow points, the emergence of strong parties running across state lines is definitely associated with the integration of federal systems. After World War II strong Christian Democratic parties faced strong socialist parties in most Western European countries. The failure of the Movement du Rassemblement Populaire (the Christian Democratic party of France) and the vicissitudes of the socialist parties of France and Italy probably prevented the parallelism of national parties from developing into a transnational party system.

Perhaps even more important, the Community was primarily an economic institution, and its economic theory was fundamentally at odds with the theory and practice of its member states. Its theory was essentially laissez-faire: the elimination of governmental barriers to the free movement of consumer goods, labor, and capital in response to the market forces that would tend to produce optimal efficiency. The national governments, on the other hand, had all become welfare states committed to using political means to ensure full employment at adequate income levels and to providing certain levels of government services whether or not they were

economically justifiable. Under these circumstances it has not been easy to integrate national economic policies, particularly because Community members have enjoyed widely varying levels of economic success in the postwar world. Some relaxation of cold-war tensions has reduced the pressure to integrate for security purposes. And finally, a quite unanticipated, worldwide revival of nationalism, in which France under De Gaulle was a leader, has blunted the drive toward internationalism.

Faced with all these problems, the "political" arm of Community—the Council of Europe—has remained an arena for negotiation among the member states rather than evolving rapidly into a transnational government. On the other hand, the Court of Justice of the European Community has been busily at work building up a body of decisions that declares the supremacy of community law over national law and the legal integrity of the community (Barav, 1979; Stein et al., 1976; Dagtoglou, 1978; Mann, 1972). In the process it has actually applied a number of community-wide economic policies that the "political" organs of the community could never have imposed (American Society of International Law, 1978).

The influence of this court in moving European political integration forward when it seems stalled elsewhere has naturally attracted the attention of scholars (Green, 1969; Cappelletti, 1979). The obvious analogies to the experience of the U.S. Supreme Court are now spawning a literature that seeks to reexamine American constitutional law in the light of European needs (Stein and Sandalow, n.d.). So far this analysis remains at the level of doctrine, but it provides the raw materials for explicit consideration of appeal as a mechanism of political integration.

VI. WEBERIAN HIERARCHY, APPEAL, AND ADMINISTRATION

Appeal may contribute to political integration in still another way. It has long been noted in Weberian writing on organizations that certain pathologies arise in the hierarchical lines designed to transmit information up and commands down the rational-legal pyramid. Such "family circles"—conspiracies among the lower-level workers to block or distort the flow of information upward—are successful in large part because of the summarizing that is essential to such a hierarchy. The ideal is not that every bit of information acquired at the lowest level will be preserved and transmitted in full by each

successive level. Such a system would result in massive information overloads as the enormous number of facts gathered at the base converged at the top. Instead, each level must edit and summarize the information received from below so that those at the top obtain an overview of the forest, from which policy decisions can be made, rather than a catalogue of all the trees. Of course, the process of successive summarization gives lower levels ample opportunity to suppress and distort information, particularly that bearing on their own insubordination and poor performance.

Hierarchical leaders adopt various strategies to deal with this organizational pathology. The most familiar is multiple lines of communication within the hierarchy, each reporting on the same events. As the summarized versions converge at the top of the pyramid, they can be verified by comparison. In the Soviet system, for instance, government, party, and labor union representatives in each factory report through separate lines that converge only in the party leadership. But the equally well known response is the "troika," the combine of factory manager, party secretary, and local union head who conspire to ensure that they all report the same things about a given factory, thereby short-circuiting the parallel lines and neutralizing comparisons at higher levels.

Other devices are therefore usually employed as additional sources of information. One is a roving inspectorate. Another, which has received less attention, is the random sample. If a major source of informational pathology is summarization, then one remedy is to dip into the flow of everyday administration, pick an event, and study it in full. This "case study" method, if repeated often enough, should allow the leadership to spot suppressions and distortions in the summaries by comparing them to the full, "slice-of-life" samples it has drawn from the mass of low-level government performance.

In this light the fascination of appellate courts with what Llewellyn (1960) calls the "trouble case" takes on a new significance. The appellate "case" is a mode by which a slice-of-life sample that is likely to contain some lower-level failure of performance is brought to the attention of the summit. Failure of performance refers not only to the alleged error by a trial judge that is the basis for the appeal. A high proportion of appeals involve instances of failure by subordinate administrative agencies or problems in the basic social and economic arrangements underlying the regime.

Appellate cases not only represent a slice of life rather than a summary but are also a random sample in a particular sense. Of course, appeals are not statistically a random sample of trial cases. Certain kinds of cases and parties will nearly always be overrepresented. But they are random in the sense that they generally cannot be controlled by the "family circles" directing the flow of summarized data to the top. As long as a right of appeal is preserved, a low-level administrator cannot know when litigation will suddenly catapult a sample of his work product to the top (Shapiro, 1975).

In Weberian terms, appeal is a channel not only for the upward flow of information but also for the downward flow of command. Here we are on ground better plowed by traditional legal analysis. For much of the conventional literature about appellate reasoning and craftsmanship, though typically phrased in terms of its contribution to the clarity of "the law," is easily rephrased in terms of its function as a command from higher courts to lower. Moreover, in recent years there has been an increasing body of work on lower court compliance with or resistance to higher court mandates, and more generally on compliance with appellate court orders (*Yale Law Journal*, 1978a; Canon, 1974; Wright, 1957; Hutley, 1976; Murphy, 1959, 1964; Sheldon, 1972). For instance, recent studies show the complex legal problems that develop between the Canadian Supreme Court and its subordinate courts because the former has not quite freed itself from subordination to the highest English courts. It is argued that though the Canadian Supreme Court is no longer formally subordinate to the Privy Council, it still tends to follow English precedent in many instances rather than developing an autonomous jurisprudence of its own. On the other hand, it does feel free to take an independent line on occasion. Thus, from the standpoint of its trial courts, the Canadian Supreme Court looks rather like an intermediate appellate court with a sporadic record of obedience to its English "superior." When the Canadian Supreme Court has not spoken on a particular issue, its trial courts must guess whether it is likely to follow English authority or strike out on its own (Weiler, 1971; Herman, 1976). We are now beginning to see appellate opinions explicitly considered as commands that must be evaluated in terms of their capacity to elicit compliance from subordinates rather than as abstract statements of law to be evaluated by conventional jurisprudential standards (compare Leflar, 1961, with Shapiro, 1969; see Rosett, 1975). And one writer has interpreted

relations between trial and appellate courts in terms of interaction within a hierarchically organized system (Early, 1976).

Appeal can also be considered as a means of command and a source of information within a hierarchical system of multiple internal controls. Judicial review of administrative agency proceedings represents an attempt to construct multiple channels of the sort we noted in the Soviet Union. Although the American literature phrases this in terms of separation of powers and the English in terms of parliamentary sovereignty, it is generally agreed that this kind of review allows the law-making superior to set a judicial watchdog over its administrative subordinates. Older administrative law scholarship tends to treat this simply as the means to ensure that administrative agencies obey the law (e.g., European Communities, 1971). The newer literature, however, has begun to deal more explicitly with the extent to which judicial review of administration facilitates or retards the lawmaker's control over the administrator, and more generally with the role of the reviewing judge in highly centralized, bureaucratized states (Wade, 1977; Schwartz and Wade, 1972; Davis, 1978; Stewart, 1975).

A reevaluation of appeal from the perspective of "the top" must begin with the recognition that most regimes assign the bulk of adjudication, and thus of appeals, to multipurpose administrative structures (Wigmore, 1969). The clearest example is Imperial China. The local district magistrate or mandarin was responsible for all governmental functions in his district, including judging. Appeal ran through general administrative channels. Although appellate judges were specialized at the provincial level, they remained directly subordinate to the provincial governors. At the capital, appeals went to the various governing boards that made up the central administration. Although the Board of Punishments received more appeals than the Board of Taxation, the Board of Administration, or any other board, and may therefore be thought of as a specialized high court of appeal, each board heard appeals within its own area of administrative responsibility. Thus the history of Chinese courts and appeals is inseparable from the history of Chinese administration (Metzger, 1973; Watt, 1972; Ch'u, 1962). Such merged systems of administration and judging may appear readily distinguishable from Western legal systems in which the judiciary has been fully differentiated from the administrative apparatus. Even in

the latter, however, administrative organs or tribunals handle an enormous number of cases, and elaborate administrative appellate processes exist. The French system, in which administrative law cases culminate in the Conseil d'Etat, is the best known example (Kessler, 1968). The symbiosis between administrative and judicial processes—trial and appellate—does not break down simply because the court system becomes more independent.

VII. APPEAL BY TRIAL DE NOVO AND APPEAL ON THE RECORD

The perspective from the bottom up has fundamentally shaped the traditional view of appellate procedures as well as institutions. This can be seen in the forthcoming *International Encyclopedia of Comparative Law*: the title of the chapter on appeals—"Attacks on Judgment"—reveals the author's conception of these procedures as a series of hurdles and opportunities for those who have lost at trial (Karlen, n.d.). In spite of this preoccupation with the individual litigant's problems, Karlen gives us more than an occasional glimpse of the institutional problems of trial and appellate courts in their dealings with one another. So far we have been considering the contribution of appellate courts to the general political hierarchy. Here we turn to the problem of internal judicial hierarchy by analyzing appellate procedure in terms of the interests of appellate courts rather than those of the party defeated at trial.

Two basic forms of appellate proceedings are encountered in the various legal systems of the world. One is trial de novo, in which the appellate court reexamines all the evidence and legal arguments advanced in the initial trial.[2] Indeed, in some European legal systems, evidence discovered subsequent to the original verdict is usually admissible, and the appellate court may even allow it to be presented orally. Often, however, appeal by trial de novo does not involve an actual second trial, in which all evidence is introduced anew, but rather a review of the complete trial record, with the appellate court taking full responsibility for its own independent findings of fact (Solus and Perrot, 1961; Cappelletti and Perillo, 1965; Karlen, n.d.). Such review is characteristic not only of modern civil law systems but also of Imperial China and Tokugawa Japan

[2] See note 1. Karlen (n.d.) observes that in both common and civil law countries, intermediate appellate courts tend toward trial de novo and highest courts toward appeal on questions of law only.

(Bodde and Morris, 1967; Wigmore, 1969) and, as we noted earlier, of many tribal systems and of Islamic law. Some American states have allowed a defendant who is dissatisfied with the outcome of his criminal trial in a police or municipal court or before a Justice of the Peace to obtain a wholly new trial by the next higher court (Bing and Rosenfeld, 1970).

Americans, however, are more familiar with appeal "on the record," in which the court reviews only questions of law, leaving questions of fact to the trial judge and/or jury. Thus the appeals court looks at only those portions of the record relevant to the trial court's legal rulings rather than fully reexamining all the evidence in order to reach its own independent findings of fact (Karlen, 1978). The distinction between trial de novo and this kind of appeal on the record is often clearer in theory than in practice. As far as we can tell, Imperial Chinese courts never reversed a finding of guilt but only concerned themselves with whether the trial court had convicted the defendant for the appropriate offense and assigned the appropriate penalty—no easy matter given the complexities of the Chinese code. Thus, though they reviewed the evidence de novo, they were essentially concerned only with questions of law. Conversely, many American appellate courts that purport to deal only with questions of law actually manage to reach pretty deeply into factual issues, for reasons we will note in a moment.

One major procedural difference that stems from the distinction between appeal de novo and appeal on the record is the remedy granted. In the former, the appellate court will generally reach a final decision in the case. In the latter, it generally "remands" to the trial court for a new verdict or additional proceedings in accord with its ruling or "reverses" the trial court, allowing the option of a new trial. Again there are variants: when an American appellate court finds that its resolution of the legal issues necessarily decides the case, it may make that decision final (Karlen, 1978).

VIII. APPEAL BY TRIAL DE NOVO AND CASSATION

The distinction between appeal de novo and on the record is not merely of technical interest, and though every legal system is the product of historical evolution, its present shape is more than a matter of historical curiosity. In civil law nations such as France and Italy the two forms of appeal interact with the structure of intermediate appellate court arrangements in ways that influence the general functions of

appeal. In both countries the first appellate level (the court of appeals) is regional and proceeds by appeal de novo. The highest appellate level (the court of cassation) only reviews questions of law (Calamandrei, 1976; cf. Solaim, 1971). This differentiation is the result of direct political intervention running counter to the legal tradition. Romanist legal procedures traditionally created an elaborate paper dossier that moved upward through a judicial hierarchy. Distinctions between trial and appeal were barely drawn, at least to the eyes of the common law observer. Indeed, the trial was not viewed as concluded until the last appellate authority had reviewed the entire record. It was that court which announced final judgment (Dawson, 1968; Herzog and Weser, 1967).

Although modern civil law systems cannot afford the luxury of such a leisurely process, the tradition survives in the first appeal. The whole record goes up to the court of appeals, contributing to the impression that the case merely continues until that court finishes its review. Then, however, an abrupt disjunction occurs. Appeal to the highest level is limited to specific questions of law. Furthermore, the court of cassation cannot decide the case; it can only find errors of law in the court of appeals judgment and remand to a different court of appeals, which then conducts another review de novo in the light of the legal ruling by the court of cassation. Indeed, the French carry this to the extreme of allowing the second court of appeal to resist the court of cassation holding and to reach the same judgment as the first court of appeal. Only after still another appeal may an extraordinary panel of the court of cassation overrule the second court of appeal, in which instance the case will return to the second court of appeal to be decided by it as the court of cassation has directed (Karlen, n.d.).

In short, the Romanist appellate tradition was violently disrupted by the institution of cassation. This disruption occurred because of the hostility of the French Revolution to the judicial activism of the *parlements*, the highest appellate courts of the *ancien régime*. The French wished to destroy the political power wielded by the top of the appeals hierarchy but realized the need for uniformity of statutory interpretation, which could not be achieved by regional courts of appeal acting independently. So they created a court that would ensure uniformity without being able to give final judgments. This historical circumstance resulted in an appellate structure that neatly illustrates the multiple purposes of appeal. The courts

of appeal correct errors. The whole system provides catharsis. The courts of cassation ensure uniformity. And the substitution of cassation at the highest level of the appellate hierarchy, in place of a power to decide cases, represents a deliberate decision to exclude judges as much as possible from exercising the political authority of the central regime and thus to downplay appeal as a device for recruiting popular support for that regime.

Such a mixed system has one consequence that points to a problem frequently overlooked. Because the courts of appeal hear cases de novo and the court of cassation hears only questions of law, the former typically frame their judgments, especially their reversals, as resolutions of factual rather than legal issues, thereby insulating themselves from cassation. Thus, the combination of appeal de novo and cassation for errors of law weakens the latter even more than was initially intended.

IX. COMMON LAW REVIEW

Tension over the role of appellate courts in fact-finding is more pervasive and has somewhat different consequences in legal systems, like the Anglo-American, that tend to confine those courts to questions of law. Such courts frequently strive to regain the power to decide facts (*Adelaide Law Review*, 1972; Carrington, 1969a; Parker, 1976; Rosenberg, 1971). In common law systems, of course, the whole notion of deciding a point of law abstracted from its concrete factual situation is anathema. So the typical record on appeal includes the trial court's findings of fact. The appellate judge may look at them in order to understand the context within which he is deciding the point of law, but he usually may not challenge the factual conclusions themselves. Once he is allowed to look, however, the floodgates open. In the United States a number of legal doctrines map the route of appellate courts back into deciding factual questions. The most prominent is the doctrine of mixed questions of law and fact (Jaffe, 1965). Appellate courts have worked so hard at eroding the boundary between facts and law that today almost any issue can be characterized as a question of law or a mixed question of law and fact, and in either case appropriate for appellate consideration.

As though this were not enough, appellate courts have announced doctrines of jurisdictional and constitutional fact, under which they independently assess the facts relied on by the lower court to ground its jurisdiction or its finding that a

statute was constitutional on its face or as applied (Gellhorn and Byse, 1979). The latter notion is particularly fruitful in generating opportunities for appellate fact-finding. For instance, an incitement-to-riot statute may be constitutional on its face but unconstitutional if applied to persons whose speech did not constitute a clear and present danger of serious injury to persons and property. In order to make an independent decision about the constitutionality of the statute as applied—and constitutionality is certainly a question of law—the appellate court must readjudicate precisely the same factual questions resolved by the trial court in determining guilt or innocence, namely whether the speech was likely to lead to violence under the circumstances.

X. APPEALS FROM ADMINISTRATIVE AGENCIES

Judicial application of these doctrines—mixed questions of law and fact and jurisdictional fact—has occurred mostly in appeals from the decisions of regulatory commissions and other administrative agencies. Although there are no detailed studies, it is assumed that two relatively distinct styles of appeal have emerged in countries such as France, where administrative and judicial appeals are structurally separated. At least the converse is true: in the United States, where the same courts hear appeals from administrative agencies and trial courts, comparable doctrines and techniques tend to be applied to both.

American courts hearing appeals from agencies typically are not limited to questions of law, but they have evolved a parallel doctrine that they ought to pay great deference to the agency findings of fact. Nevertheless, they do reverse agency decisions that are not based on substantial evidence or that are clearly erroneous or arbitrary and capricious. In evolving these standards, federal courts have borrowed more or less openly from their experience in reviewing federal trial courts (Stern, 1944).

Indeed, the dynamics of administrative review in the United States indicate that appellate courts can overcome nearly any impediment in order to maintain their control over subordinate tribunals. Modern American legislation delegates broad rule-making power to administrative agencies without providing any clear statutory standards to govern its exercise. It is therefore almost impossible for a reviewing court to reverse an agency on a point of law, as it does a trial court, since the agency makes so much of its own law. American

courts have responded to this anomaly by employing what appear to be evidentiary standards as vehicles for attacking the substance of agency decisions. Thus, the same appeals courts that often treat a question of fact raised at trial as if it were a question of law will treat a question of law raised in an administrative proceeding as if it were evidentiary. Even in review of administrative agency proceedings, however, courts do not openly substitute their factual judgments for those of the agency but act as though they are only reviewing whether the agency has mustered a sufficient body of evidence to support its decision. When an appellate court does challenge an agency finding of fact directly, it frames that issue as a mixed question of law and fact, just as though it is dealing with a trial court.

The structure of the new Canadian Court of Appeals also illustrates the continuing dialectic of appeal de novo versus appeal on the record in administrative law. The court has a "trial division" and an "appeals division." The former reviews administrative decisions, using traditional prerogative writs and common law actions that investigate both law and fact more or less de novo. The appeals division hears cases under the direct-review provisions of many Canadian statutes that authorize administrative action and proceeds in a fashion closely analogous to that of Anglo-American appellate courts examining trial court decisions on the record (Lemieux and Vallières, 1976).

XI. FACTS AND APPELLATE COURT CONTROL OF TRIAL COURTS

As we have already noted, courts that do not hear appeals de novo may usually reverse a trial court finding on the ground that the evidence is insufficient to justify the verdict (Stern, 1944). The extreme instance is the United States Supreme Court. Because of its status as the highest appellate court and its respect for the theory of federalism, the Court purports to defer almost totally to the factual findings of state trial courts (except when these facts raise constitutional issues). Nonetheless, the Court will overturn a state criminal conviction based upon "no evidence" at all (*Thompson* v. *Louisville*, 362 U.S. 199, 1960). Since it is impossible to imagine a case in which the prosecution presented absolutely no evidence, the test must actually involve some evaluation of the weight of the evidence offered. Most American appellate courts permit themselves far greater scope. For instance, although they take

the position that the trial court alone can assess "demeanor" evidence and is entitled to great deference in all evidentiary matters, appellate opinions frequently reveal a detailed reconsideration of the evidence offered.

But what is an appellate court to do, if it is authorized only to decide questions of law, when faced with a trial court that consciously seeks to shield itself from review, as the French courts of appeal do by resting their judgments on factual grounds? This problem is particularly acute when trial courts are not required to write full opinions or the record on appeal does not contain the evidence, and it is therefore most extreme when oral trials fail to preserve the testimony, as was the case in common law systems until very recently. (Roman law countries avoid this by creating a dossier.) The basic response of common law appellate courts has been to fasten on what they could get—typically the judge's procedural rulings and jury instructions. Indeed, because the latter were often the only statement of law in the record sent up by the trial court, they frequently became the hook on which the appellate court had to hang a reversal. As a result, contemporary jury instructions tend to be very peculiar: although ostensibly addressed to the jury and designed to explain the law to laymen, they are actually formulae addressed to the appellate court and adopted by the trial judge directly from earlier opinions of that court. For by using the very words uttered by the appellate court, the trial judge protects himself from reversal "on the law." Thus the tactical defenses of trial courts against appellate review may have unanticipated consequences for trial procedure. More generally, one would expect an appellate court without authority to review de novo to concentrate on the only alternative, trial procedure, even when its doubts were substantive, and to find trial courts setting up a smoke screen of carefully followed procedures behind which their substantive judgments would be safe from review. Although these comments are somewhat speculative, they do indicate that differences between forms of review, and especially in relation to facts, may be important for understanding not only the appellate process but also civil and criminal procedure in general.

XII. STYLES

There are many styles of appellate opinion (Leflar, 1974a; Wetter, 1960), each closely related to appellate structure (Goutal, 1976; Lawson, 1977; Llewellyn, 1960; Leflar, 1961;

Halpern and Vines, 1977). One extreme is what we might call report and recommendation. In both Imperial China and Tokugawa Japan, trial courts and intermediate appellate authorities cast their opinions in the form of reports and recommendations to superiors, ultimately to the emperor or shogun. In theory, final judgment in the case—or at least the serious case—was the domain of the emperor himself (through his personal representative) and took the form of an annotation of approval on the ultimate report (Bodde and Morris, 1967; Wigmore, 1969). The opposite extreme is illustrated by the opinions of the United States Supreme Court. They purport to be independent and final. Individual justices sign majority, concurring, and dissenting opinions (McWhinney, 1953). They cite previous opinions of the Court, which they purport to follow but are free to reject (Stone, 1971). Opinions take the form of personal, discursive essays that use both legal and nonlegal arguments to explain and justify the decision. In contrast to the Oriental model, the form and style of opinion emphasize that each judge is personally responsible for the final outcome of the appeal and that it rests on wide-ranging political, social, and economic considerations (Ely, 1978). Although many decisions seek to present the outcome as following ineluctably or mechanically from preexisting rules, form and style quite frankly exhibit the degree to which new law is being made.

Of course, we know that many reports to the Chinese emperor were actually the innovative products of strong-minded imperial officials and that much Chinese law consisted of imperial edicts drafted to resolve open legal questions and generalize from the problems of a particular case. The judges may have been abject servants of the emperor, yet his very power meant that their "opinions" need not always express slavish obedience to existing law but could, instead, recommend that he change or extend it (Bodde and Morris, 1967).

The style of continental European appellate opinions appears designed to obscure most of the dimensions in which the social scientist might be interested. Inevitably I will overgeneralize because national styles differ and may be changing. Contemporary German courts, for instance, now seem increasingly willing to expose the actual reasons for their decisions. Perhaps the new German Constitutional Court, which writes opinions resembling those of the United States Supreme Court, may be influencing other courts.

The basic civil law style, however, is a single impersonal opinion that does not cite previous cases, present extended explanations or analyses, or suggest the alternatives or explain why one was chosen over others. The most extreme examples are the opinions of the French Court of Cassation, which consist of a series of long, incomplete sentences, prefaced by a "whereas" and culminating in a brief conclusion stating the ruling of the court. The "whereas" clauses contain brief statements of the relevant code provisions and cryptic and conclusional statements of the factual and legal issues. Opinions are not signed. There are neither concurrences nor dissents. The court sits in panels so that successive decisions concerning the same legal issues will be the product of different judges. The intended impression is a single correct solution proceeding by irresistible logic from the sacred and complete words of the code. The opinions are so opaque that one can gain an idea of the actual issues and their resolution only by consulting the arguments of counsel or annotations by learned commentators. But since French courts really do rely heavily on precedent, these materials have far greater influence than they would in the United States, for it is they, and not the court's opinion, that tell you what the precedent actually is.

In dealing with appellate style we necessarily run the risk of crossing the line into an analysis of judicial decision making, particularly because the use of case citations raises the whole question of *stare decisis*. Certainly some styles reveal the actual process of decision making more fully than others. But my point here is different: style both reflects and contributes to the status and independence of appellate court judges and the link between appellate courts and the rest of the regime. For instance, the American practice of signed majority opinions, concurrences, and dissents may be compared to the English practice of personal seriatum opinions (none of which is the majority opinion) and to the Continental practice of a single per curiam opinion uncomplicated by concurrences or dissents. The American style maximizes the visibility of individual appellate judges. Lawyers can study their opinions and voting patterns and adjust arguments to the outlook of those judges whose votes are crucial to a particular outcome and whose previous views suggest they can most readily be persuaded to favor it. The English style reveals even more information about each judge and thus provides similar opportunities. But the Continental style renders the individual judge anonymous and rules out such an approach unless the lawyers can draw on

sources of information other than the opinions. On the other hand, the Continental style strengthens the hand of the court by suppressing any public airing of differences. American appellate courts may approach either the Continental model, when they produce a single majority opinion, or the English, when they divide into numerous concurrences and dissents. Of course, there is no direct and simple correlation between impersonal, unanimous appellate opinions and the degree of political power wielded by the court, but this relationship seems worthy of further study.

XIII. TWO MODELS

Although appellate styles, procedures, and institutional structures interact in many complex ways, for analytical purposes one might construct two ideal types of appellate court.[3] In the first, the court has the power of "cassation" but cannot make a final decision. Its rulings apply only to the instant case and have no precedential significance. Its per curiam opinions are cryptic pseudosyllogisms rather than discursive explanations and justifications; they provide few clues to either the values of the judges or their modes of analysis and thus offer little insight into how the court will decide future cases. The court consists of a large number of judges who sit in panels. These judges reach the highest appellate bench through promotion from within a tightly disciplined career judiciary. The court has no discretion over what appeals it will hear. It lacks the power of constitutional judicial review. It is rigorously confined to questions of law and may not see the trial record. It is "assisted" by a government attorney who assumes the major burden of presenting each case. Its judges are not politically independent. Administrative courts are completely separate and have their own appellate structure.

The second ideal-typical court may remand a case *or* issue a final judgment. It hears evidence and resolves issues of fact as well as law. Its majority opinions are signed and frequently accompanied by concurrences and dissents; all are replete with combined explanation and justification. Opinions are binding precedents for the lower courts and are generally, though not necessarily, followed by the high court as well. The court consists of a small number of judges, all of whom sit in each

[3] For a brief summary of the data from which these types are constructed, see Pugh (1975).

case. They are appointed or elected for life after success as lawyers or politicians. The court has discretion over what it will hear. It has its own staff and decides whether to accept amicus briefs; government attorneys appear only when the government is a party. The judges are politically independent. There is a complex but vaguely worded written constitution, which the court interprets when engaging in judicial review. The court reviews both administrative decisions and trial court judgments.

These two models raise a number of research questions and provide a framework for comparison. The paucity of available materials on appeals suggests that new approaches to this highly visible form of judicial activity may significantly advance our understanding of the legal process.

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