

Chapter I

The Legal System

The subject of this book is the legal system. Before going any further, then, something must be said about this phrase. A legal system is not a thing like a chair, a horse, or a book; it is not a well-defined concept in the social world like the Roman Catholic church or the nuclear family. In brief, there is no definition on which scholars—and the public—agree.

There are many ways, in fact, to look at law or the legal system. One way is as “the law,” that is, a set of rules or norms, written or unwritten, about right and wrong behavior, duties and rights. This is a common usage of the term “law”; for example, we ask whether “the law” allows us to deduct the cost of lunch on an income tax return, or we say that it is “against the law” to drive through a stop sign or rob a bank. Legal scholars often, too, talk about law in this way. John Chipman Gray defined law as “rules which the courts . . . lay down for the determination of legal rights and duties.”¹ There are many similar definitions. Although Gray mentioned only the courts, “law” may mean both the rules *and* the structures that (on paper) make or apply them.

The trouble with this view of law is that it tends to ascribe to “law” some sort of independent, meta-social life; it tends to overlook the fact that structures and rules look one way on paper, while acting quite differently in life. Almost everyone concedes that law is to some degree a social product; and that law on the books and law in action are not

¹John Chipman Gray, *The Nature and Sources of the Law* (1909), p. 82.

invariably the same. Rules and structure alone do not tell us how the machine really works. These provide no way to sort out dead law from living law. They do not tell us how and why rules are made and what effect they have on people's lives.

"The law"—meaning structures and rules—is only one of three kinds of phenomena, all equally and vividly real. First, there are those social and legal forces that, in some way, press in and make "the law." Then comes "the law" itself—structures and rules. Third, there is the impact of law on behavior in the outside world. Where "the law" comes from and what it accomplishes—the first and third terms—are essential to the social study of law.

Legal scholarship has always neglected the first phenomenon, that is, the *input* side of law—a neglect as serious as neglecting food, water, and air in studying a living system. Traditionally, legal scholarship treated litigants, pressure groups, and social backgrounds cavalierly. Scholars took an *internal* view of legal development. Outside forces meant nothing in discussing how a rule of law came to be. American and British jurists wrote as if courts made the whole thing up. The leading treatise on torts in the United States states flatly that the "law of products liability began with the case of *Winterbottom v. Wright* [an English case of 1842]"; the courts later "whittled down the general rule" of that case, until "finally" in 1916, "the problem fell into the hands of Judge Cardozo," who "struck through the fog" in the "famous case of *MacPherson v. Buick Motor Co.*," a decision which "found immediate acceptance" in other courts.²

What is striking about this language—and it is typical—is that only the faintest mention is made of the social background. Everything is ascribed to the judges. All the praise and blame are theirs.³ Yet doctrines do not come from thin air. Intellectual debate does not make case-law; cases are controversies, and they presuppose conflicts, not to mention people and groups who take steps to set the legal process in motion. Today, courts and legislatures in the United States are building up a body of environmental law. No one had heard of such a thing in 1950. The change would be unthinkable without a mass movement putting demands on the law. Courts could not have invented this body of law on their own. Again, since 1950, the problem of *obscenity* has

²William L. Prosser, *Handbook of the Law of Torts* (4th ed., 1971), pp. 641-643.

³Once in a while lawyers, who may put some ideas into the judges' heads, get some credit, too. See, for example, Benjamin Twiss, *Lawyers and the Constitution* (1942), blaming on the lawyers the laissez-faire doctrines of the late nineteenth century. In continental literature, jurists give themselves some of the credit that common-law writers give the judges.

been constantly in court—what is it, how far can government control it, what forms of license are permitted in movies, plays, and books. Is obscenity “free speech,” protected by the First Amendment? The first amendment was adopted in the late eighteenth century; since then, its language has not changed. Yet, for generations, obscenity was hardly an issue at all. The literature of sex was underground. The Supreme Court did not utter a definitive word, until *Roth v. United States*, decided in 1957.⁴

Why did the question come to a head in that year? The *issue* in the legal sense was old; the concept of obscenity was old; the books were old; the language of the First Amendment was old; but social standards had somehow changed. Victorian morals were retreating; pornography was profitable; some people were demanding legitimation. The pressures led to action and reaction. Without it, the law of obscenity would never have awakened from its sleep. What is true of obscenity and civil rights⁵ is probably true of all other legal developments. Indeed, one could write a history of law in which legal institutions played no role. Such a book would deal with litigants, social movements, and pressure groups rather than judges and courts. This approach would seem strange to some, even ridiculous; yet it might paint a truer picture of the law than the hundreds of books which omitted what this book has included.

Legal scholarship has not neglected the *outputs* of the system as thoroughly as the inputs. Rules and decisions are outputs, and most of the literature is about this subject. However, the third reality, that is, the impact of output on the world outside, is usually overlooked, assumed, or ignored. The growing literature on law and society tries to fill this gap. Much of this book will try to sum up what we know or can guess about the effect of law on society.

The basic argument of this book pivots about a few simple propositions which are closely linked with each other. The first is a proposition about legal behavior, that is, about the impact of rules, orders, and

⁴354 U.S. 476 (1957). This case held, basically, that the Constitution did not protect “obscenity,” but that material was not obscene, unless it was “utterly without redeeming social importance.” In an earlier case, *Doubleday & Co. v. New York*, 335 U.S. 848 (1948), New York state had convicted the publisher of publishing and selling an obscene book, which was Edmund Wilson’s *Memoirs of Hecate County*. The Court divided evenly; this sustained the lower court opinion, *People v. Doubleday & Co.*, 297 N.Y. 687, 77 N.E. 296 (1947), which affirmed the conviction. By custom an equally divided Court writes no opinions.

⁵See, for example, Clement E. Vose, “Litigation as a Form of Pressure Group Activity,” 319 *Annals* 20 (1958).

commands on conduct. The proposition is that three clusters of factors determine this impact—sanctions, social (peer group) influence, and internal values (conscience, concepts of legitimacy, etc.). However, those subject to law do not simply react; they also interact. That is, they translate their feelings, attitudes, motives, and inclinations into group action, bargaining, attempts to influence the law, and perhaps into attempts to bend or corrupt the application of law.

This interaction is part of the network of forces which at the same time is at work *creating* norms, rules, and orders in the first place—creating what we will call “legal acts.” These forces are social forces; they arise out of *interests*, but individuals and groups that have interests do not necessarily turn to legal institutions to gratify their wants. An interest (a felt need or desire), then, is not the same as a *demand* on the legal system. A demand comes from a belief or desire that something can or should be done to enhance an interest. A person may feel he needs and deserves more pay for his work; but he may or may not translate that interest into a *demand* for money, either from his boss or the state (by lobbying for a higher minimum wage, for example). Thus pressure to create new law, or to preserve old law, flows out of attitudes and feelings which set up demands on a group or individual basis. The basic proposition about the nature of the legal system is that these *demands* determine its content. That is, law is not a strong independent force but responds to outside pressure in such a way as to reflect the wishes and powers of those social forces which are exerting the pressure. Just as legal behavior is a mixture of conduct based on self-interest (response to sanctions) and social and moral motives, so too the actual influence of persons and groups comes from self-interest monitored by those cultural factors which determine which interests will and which will not turn into demands.

The first part of this book will deal specifically with the *impact* of legal acts. We use the term *legal act* as a convenient umbrella-word for any relevant piece of behavior by a person with authority, acting within the legal system—judges, lawyers, legislators, officials of all sorts and conditions. When Congress passes a law, it performs a legal act. So does a judge when he renders a verdict, a policeman when he issues a ticket. Every day, every legal system produces hundreds of legal acts; these are communicated to or visited on people in society. The message is given; these people then modify or fail to modify their behavior for one reason or another, in response to the legal act. We will refer to any such response as *legal behavior*. Legal behavior can be a direct response to a legal act. (The policeman shouts “stop”; and the gunman stops. If he does not, the officer legally shoots.) It can be a

delayed reaction or a diffuse response to many legal acts. To consult a lawyer about a divorce is legal behavior of this sort; so is settling a case out of court.

Chapter II will classify and discuss types of legal acts, in particular, *rules*; we will then move on to analyze and discuss the conditions under which legal acts make or do not make an impact on those to whom they are addressed (Chapters III and IV). This part of the book deals with the effect of legal acts on behavior, that is, on the life of society. But the most basic proposition underlying this book is that legal acts themselves are the product of social forces. The next part of the book examines and expands on this proposition.

It is, of course, too crude to state simply that social forces "produce" legal acts. People and groups have real, concrete interests and needs, but only some of these turn into demands on the legal system. A hungry man has real interests and needs, but if he suffers in silence, he has made no demand, and legal institutions not only *can* ignore him, they most certainly will. Culture and ideology are important intervening variables, determining when interests turn into demands. One chapter, then, will deal with *legal culture* (especially the consciousness of right) and with some attention to legal reasoning and style. The last chapter takes up the question of law and social change, looking explicitly at long-term trends.

THE LEGAL SYSTEM

The subject of this book, then, is not "the law" but the legal system. A system, essentially, is an operating unit with definite boundaries. Systems can be mechanical, organic, or social. The human body, a pinball machine, and the Roman Catholic church are all systems. David Easton has defined the *political system* as a "boundary-maintaining set of interactions imbedded in and surrounded by other social systems to the influence of which it is constantly exposed."⁶ This rather heavy definition introduces some fundamental concepts. The political system is a "set of interactions"—a social system, in other words, not a structure or machine, but behavior, and behavior that interrelates with other behavior. And the system has boundaries; that is, a careful ob-

⁶David Easton, *A Framework for Political Analysis* (1965), p. 25; Dallin H. Oaks and Warren Lehman, *A Criminal Justice System and the Indigent* (1968), pp. 179–188, apply the language of systems-analysis to criminal justice. See also Sheldon Goldman and Thomas P. Jahnige, "Eastonian Systems Analysis and Legal Research," 2 *Rutgers-Camden L.Rev.* 285 (1970).

server can see where it begins and where it ends. He can mark it off as different from other systems. Any set of interactions can be called a system, if an observer can describe it as such, by finding real boundaries or defining some.

But what are the boundaries of the *legal* system? Can we mark the legal system off from other social systems? Can we tell, in other words, where it begins and where it ends? *Legal* means nothing more than pertaining to law; hence, to define a legal system, we need some sort of working definition of the law.

Legal philosophers⁷ and social scientists⁸ alike have made innumerable attempts at definition. Yet, definitions of law, however various, fall into a few natural groups, reflecting different ways of looking at law and different purposes in writing about it. The first major type is *institutional*. In many societies, there are people and institutions that, by conventional reckoning, are part of the legal system. One can build a definition around these professionals and institutions: The legal system is bounded, then, by the relevant work of lawyers, judges, police, legislators, administrators, notaries, and others.⁹

If law is what lawyers and legal institutions do, then a society without lawyers or other professionals and without legal institutions is a society without law. Many simple societies, in fact, do not have lawyers or special legal institutions. Nor would there be "law" in many subsystems in more complex societies—schools or factories or clubs. Institutions and professionals are difficult, too, to compare cross-culturally. Lawyers do different things in different societies. "Courts" exist in many societies, but what exactly is a court?

The cross-cultural problem is particularly vexing for anthropologists. Hoebel, for example, defines "law" to include the concept of a court; but then, in order to find law in simple societies, he stretches the idea of a court almost beyond recognition. The Eskimos, for example, have no obvious "courts." It sometimes happens that a killer threatens the safety of the community. A "public-spirited man" may then decide

⁷See, in general, Julius Stone, *Legal System and Lawyers' Reasonings* (1964), pp. 165ff.

⁸See, for example, Leopold Pospisil, *Anthropology of Law, A Comparative Theory* (1971), pp. 11–96; Jack P. Gibbs, "Definitions of Law and Empirical Questions," 2 *Law and Society Rev.* 429 (1968).

⁹Of course, the word "relevant" is a necessary qualification; as Jerome Skolnick points out, lawyers, for example, do a lot of things—"eat, sleep, go to the theater, read, write, talk, make love." The sociology of law would be interested only in what they do *as lawyers*—in their professional capacity. Jerome Skolnick, "Social Research on Legality: A Reply to Auerbach," 1 *Law and Society Rev.* 105, 107 (1966).

to act. He sets about "to interview, one after the other, all the adult males of the community." If these men agree that the killer should die, the "public-spirited man" goes out and kills him. "No revenge may be taken by the murderer's relatives," because a "community 'court' has spoken." A social norm is "legal," according to Hoebel, "if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting."¹⁰ This presses the idea of a court or institution to the limit.

Paul Bohannon also feels that legal *institutions* are the essence of law. An institution is legal if people in a society use it to "settle disputes . . . and counteract any gross and flagrant abuses of the rules." *Law* is a body of binding obligations which have been "disengaged" from the institutions in which they arose and "re-engaged" in legal institutions. The essence of law is this "double institutionalization." Legal institutions "have some regularized way" to "interfere" with "malfunctioning" institutions, to pluck out the problem and handle it "within the framework of the legal institution."¹¹

Institutional definitions of law typically look for the nature of law in its *public* character—law is bound up with government. Donald Black recently defined law as "governmental social control . . . encompassing any act by a political body that concerns the definition of social order or its defense."¹² A cluster of definitions express or imply that the *state*, pure and simple, is the source or criterion of law. The legal philosopher John Austin defined law as the command of the sovereign.¹³ Oliver Wendell Holmes, Jr., defined law as "the prophecies of what the courts will do in fact."¹⁴ There are considerable differences of opinion about what makes up a state, a government, or courts. The argument, in part, is whether "law" is universal or not. States, governments, and courts are not universal; but, as Leopold Pospisil points out, *authority* and authority structures are everywhere. Hence one might find law universal, too, even in the absence of a "state."¹⁵ For Pospisil,

¹⁰E. Adamson Hoebel, *The Law of Primitive Man, A Study in Comparative Legal Dynamics* (1954), p. 28.

¹¹ Paul Bohannon, "The Differing Realms of the Law," in 67 *Am. Anthropologist*, no. 6, part 2, 33, 35 (1965).

¹²Donald Black, "The Boundaries of Legal Sociology," 81 *Yale L.J.* 1086, 1096 (1972).

¹³John Austin, *The Province of Jurisprudence Determined*, originally published in 1832 (1954).

¹⁴Oliver W. Holmes, Jr., "The Path of the Law," 10 *Harv. L.Rev.* 457, 461 (1897).

¹⁵Leopold Pospisil, *Anthropology of Law, A Comparative Theory* (1971), ch. 3. Pospisil isolates four "attributes of law" which he feels are empirically important and allow good cross-cultural comparison: authority, intention of universal application, *obligatio*,

norms are legal if they carry the threat of a *sanction*. This is an element, too, in Hoebel's definition; and Max Weber, in a well-known passage, defined law as an "order . . . externally guaranteed by the probability that coercion (physical or psychological) to bring about conformity or avenge violation will be applied by a *staff* of people holding themselves specially ready for the purpose."¹⁶

Other definitions, as we have mentioned, equate law with a set of *rules*. Clearly, in a sacred law system, "the law" is the body of sacred norms and nothing more. Other scholars look at law as rules or norms but not necessarily *official* ones; they stress the customary basis of law, that is, actual patterns of behavior. Michael Barkun finds law in the shared norms of a "jural community."¹⁷ Eugen Ehrlich coined the phrase "living law" to describe actual behavior patterns in a community.¹⁸ Bronislaw Malinowski found law in patterns of behavior enforced by "reciprocity."¹⁹

These definitions may, and mostly do, avoid defining law as bound up with the government or the state. So, too, do those definitions which define law in terms of the functions it performs. One function, for example, is dispute settlement. One can treat as "legal" any institution that settles disputes. Or we can call "legal" every aspect of society and every institution that exercises social control. Functional definitions are useful in comparing legal cultures.²⁰ Institutions with different

and sanction (ibid., p. 43). By "intention of universal application," he means that "authority, in making a decision, *intend(s)* it to be applied to all similar or 'identical' situations in the future" (ibid., p. 79). *Obligatio* refers to "that part of a decision which states the rights of one party to a dispute and the duties of the other" (ibid., p. 81).

¹⁶Max Rheinstein, ed., *Max Weber on Law in Economy and Society* (1954), p. 5; for Henri Lévy-Bruhl, "law" includes the element of "obligation"; there is no obligation without sanction, thus "one might define law as a system of sanctions," *Sociologie du Droit* (1961), pp. 21–23.

In jurisprudential literature, there is much dispute over whether or not a norm must bear this mark of Cain—the threat of sanction—in order to qualify as "legal." As Jack Gibbs has pointed out, it is easy to mistake this question, basically a question of definition, with the far more complicated question, what motivates people to follow or not follow rules? Jack P. Gibbs, "Definitions of Law and Empirical Questions," *2 Law and Society Rev.* 429 (1968). Sanctions are positive as well as negative. A norm or rule that promises a subsidy also contains a sanction. See Chapter IV.

¹⁷Michael Barkun, *Law Without Sanctions* (1968), p. 92.

¹⁸Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (1936). Leon Petrazycki spoke of "intuitive" law, that is, legal behavior which rests on general ideas of right and wrong rather than on some specific statute or rule. Much of intuitive law, although not all, is unofficial. See Nicholas S. Timasheff, introduction to *Law and Morality: Leon Petrazycki* (1955), pp. xxviii, xxix.

¹⁹Bronislaw Malinowski, *Crime and Custom in Savage Society* (1926).

²⁰On the importance of "functionality" in comparing legal systems, see Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung* (1971), vol. I, pp. 28–32.

names can perform the same function; and the "same" institution or role can be functionally very different in different societies. Queen Elizabeth I and Queen Elizabeth II were both queens of England and titular heads of the state, but their functions are light-years apart.

Any group, organization, or system—state or no state—can perform "legal" functions. If, like Talcott Parsons, one looks on law as a "general normative code" performing "integrative" functions,²¹ then one can talk about "private" legal systems²² or the "law" of a club or a school, meaning the ways in which clubs or schools make rules and apply them, settle disputes, or in general "integrate" themselves. Rules and processes in a school may have no official (state) character, but they will be *like* the rules of the state in their function or object, or simply in the way people go about using them. One can even talk about the "law" of a shopping center (a "community of landlord and merchant tenants") and describe how it operates.²³

The vice of functional definitions is the same as their virtue: They are terribly broad. Who and what in the United States has the function of "settling disputes"? Courts, of course; but also policemen who break up brawls in a bar; the legislature, resolving conflicts between interest groups; dozens of agencies of government, such as the National Labor Relations Board; and also neighbors, teachers, arbitrators, marriage counselors, lawyers in their offices, clergymen, and psychiatrists, not to mention heads of families and, in other societies, heads of clans. Which of these, if any, do we want to keep out of the concept of the legal system? A parent, who settles a quarrel between two children about an ice cream cone, a coloring book, or a ball is not part of the legal system—not because his work is inherently nonlegal, but because if *his* work is "law," then the legal system has been robbed of any meaningful boundaries. For some purposes, we might want so broad a view of law—if, for example, our primary interest was the social psychology of dispute settlement wherever it occurs. Usually, however, we will want to limit ourselves to phenomena that are "legal" in some more conventional way.²⁴

²¹Talcott Parsons, *The System of Modern Societies* (1971), p. 18.

²²William M. Evan, "Public and Private Legal Systems," in William M. Evan, ed., *Law and Sociology* (1962), p. 165.

²³Spencer MacCallum, "Dispute Settlement in an American Supermarket, a Preliminary View," in Paul Bohannon, ed., *Law and Warfare, Studies in the Anthropology of Conflict* (1967), pp. 291, 292.

²⁴Another problem is deciding what the functions are. There is a tendency here, as in many of the definitions, to overstress the control or negative aspects even in dispute settlement. Law, especially in modern society, has a positive function: It creates opportunities and promotes desired behavior.

One last type of definition looks at law not as function or functions nor as institutions or rules but as some special kind of *process* or *order*. Lon Fuller speaks of law as the "enterprise of subjecting human conduct to the governance of rules."²⁵ Philip Selznick agrees and defines the "governance of rules" as "shorthand for a system of order that contains specialized mechanisms for certifying rules as authoritative and for safeguarding rule-making and rule-applying from the intrusion of other forms of direction and control."²⁶ His particular interest is in a concept of process he calls *legality*. Legality, the special subject of the serious student of law, "has to do mainly with *how* policies and rules are made and applied rather than with their content."²⁷ Legality is rather like the constitutional concept of due process; it can be used to measure "governance by rules" in many areas of life—in the factory, for example. Selznick is unwilling "to equate law and state"; to do so, "impoverishes sociological analysis, because the concept of law should be available for study of any setting in which human conduct is subject to explicit rule-making."²⁸

There is, of course, no "true" definition of law. Definitions flow from the aim or function of the definer. Selznick's definition, for example, is frankly normative. It follows from his concern with justice in modern society, his wish to redirect legal scholarship. Definitions that equate law with rules allow legal scholarship to ignore empirical questions and justify traditional legal thought.

In this book, we want to examine how legal institutions relate to society. We want to apply to legal process techniques, findings, and attitudes of social science. For this purpose, a rough, eclectic definition of law will do. The main emphasis is on the law of urban, industrial nations. In these countries, there are social subsystems that are clearly defined by the public as part of the law. These include the courts, legislatures as lawmakers, and the system of criminal justice. Some of these plainly overlap. Less universally, but still rather clearly, one could assign to the realm of the law much of the work of administrative agencies and the private counseling of lawyers. The "legal system" would be nothing more than all these subsystems put together. One might picture the ideal definition as a large, perfect circle; the subsystems as little boxes and squares, each smaller than the circle. If we put together enough boxes of the right shape and size, we get something

²⁵Lon L. Fuller, *The Morality of Law* (1964), p. 106.

²⁶Philip Selznick, *Law, Society and Industrial Justice* (1969), p. 7.

²⁷*Ibid.*, p. 11.

²⁸*Ibid.*, p. 8.

that adds up more or less to a circle. In some places, however, the boxes do not quite fill out the circle; in others, they push slightly over the edge. Geometrically, the figure is rough and imperfect, but it is close enough to the circle for our use.

In short, we present no real definition of the "legal system." There are subsystems, most of them by common consent part of the legal system. They have in common that they are systems, that they operate with norms or rules, and that they are connected with the state or have an authority structure that can at least be analogized to the behavior of the state. Whether what a parent does to govern his children is part of the "legal system" does not matter, if what is said here applies to his little world, *mutatis mutandis*.

The lack of precise definition would, perhaps, be a serious failing, if we believed in a distinctive science of *law*. But "law" is not a science, if "science" means that principles of law can be verified experimentally, or discovered inductively, or deduced from each other as in geometry or biology. The idea of "legal science" has been strongly urged, especially by continental legal scholars.²⁹ We feel that there can be science *about* law but not legal science. We treat "law" and the "legal system" as parallel to such terms as "business," "China," or "the theater." All of these are or can be the *subject* of science—one speaks of business psychology, or the social anthropology of China, or the economics of the theater—but they are not sciences in themselves. To us, too, law—or at any rate, the legal system—is a subject of social science, not an independent social science, indeed not a science at all.

THE LEGAL SYSTEM AND ITS COMPONENTS

Whatever character one assigns to the legal system, it will have features common to every system or process. First, there will be *inputs*, raw materials which enter at one end of the system. A court, for example, does not begin to work, unless someone makes the effort to file a complaint and set off a lawsuit. Even earlier, some concrete act has served as a trigger: A policeman arrests a man; a landlord harasses a tenant; a man is defamed by his neighbor, injured by a speeding car, deserted by his wife. Physically, lawsuits begin with pieces of paper,

²⁹See John H. Merryman, *The Civil Law Tradition* (1969), p. 66: "The concept of legal science rests on the assumption that the materials of the law (statutes, regulations, customary rules, etc.) are naturally occurring phenomena or data from the study of which the legal scientist can discover certain principles and relationships, just as the physical scientist discovers natural laws from the study of physical data"; see also Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (2nd ed., 1967), ch. 3.

pleadings filed in court; without these no trial is possible in our society. What happens next is that the court, its staff, and the parties begin to *process* the materials put in. Judges and officials *do* something; they work on the raw materials in a systematic way. They deliberate, argue, make orders, file papers, and hold a trial. The parties and lawyers also play their parts. Next, the court produces an *output*—a verdict or decision; sometimes the court hands down a general rule as well. The court may decide for the plaintiff, or for the defendant, or reach some compromise. The result is in any event an output, even if the court simply refuses to hear the case. Moreover, the output may be ignored or not, may have a large or a small effect. Information about this effect flows back into the system. This process bears the name of *feedback*.³⁰ One can speak of feedback more generally to mean the way the product or output of a system turns back on and affects the system itself. A civil rights organization brings a lawsuit against a southern school district. Plaintiff wins his case. Other persons or groups hear the news and bring lawsuits against this or some other district or on some related issue. Other effects are felt by legislatures, policemen, mayors, and chairmen of agencies.

In the broad sense, inputs into the legal system are shock waves of demand, radiating out of society. In a narrower sense, the inputs are pieces of paper and bits of behavior that set legal process in motion. In many legal systems, litigants cannot approach a court informally; they must take some formal step, such as filing a pleading of a particular type. In court, these are writs, petitions, pleadings. Hundreds of rules concern the form and the matter of inputs; these rules are an indispensable part of modern Western law. The common law in particular developed much of its content out of rules about writs and forms of action. Today, procedure plays a smaller role in the law, but the rules still have major significance. They distribute power (jurisdiction) among legal institutions. They regulate the role of actors in the process. They create or lessen the dependence of laymen on lawyers. Lastly, they determine access to law and hence serve to keep intact the structure of power in society or allow change only in approved and valid ways.

The heart of the system is the way it turns input into output. The structure of the legal system is like some gigantic computer program, coded to deal with millions of problems that are fed daily into the machine. Rules of organization, jurisdiction, and procedure are part of the coding. Equally important are the substantive rules of law. They are an output of the system, but one that serves to cut future outputs to shape.

³⁰See Easton, pp. 127–129.

One conventional view of the legal system—and especially of the courts—is derived from the metaphor of a huge, highly programmed machine. It looks at rules of law as a book of instructions which cover, if not all, then surely most life situations that come up for law to cope with. This view we associate especially with the late nineteenth century, but it has never died. Jurists felt that ideally law should be certain, predictable, and free from the subjective—highly programmed, in other words. Anything else was less than just. Moreover, this ideal was thought to be roughly attainable. “When an act of Congress is . . . challenged,” said Justice Roberts of the United States Supreme Court, “the judicial branch of the government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.”³¹

A judge who performed this trick honestly, laying the two texts side by side, would presumably come up with one right answer. This is the mechanical theory of law. In a factory that makes plastic toys, once one knows the machine, the raw materials, and what the machine has been taught or made to do, one predicts very well what the machine will turn out. Of course, this picture hardly fits the legal system. It ignores the element of choice—the leeways, options, and irrationalities. In the twentieth century, legal realism became a dominant school of American jurisprudence with equivalent schools in other countries. Its message was that one could not, in fact, predict output wholly from structure and rule—at least not always.³² The realists, however, were in some ways almost as remiss as their predecessors in ignoring the input side of law. That is, they noted that the judge was not a machine; they assumed he was more like a god. The basic thrust of their work was to point out this fact and to exhort the god to behave in a more principled and socially conscious way.³³

We can assume that the judge is not a god and not a machine, and that the *structure* of the legal system, as a whole, is neither god nor

³¹ *U.S. v. Butler*, 297 U.S. 1, 62 (1936).

³² A general survey is Wilfrid E. Rumble, Jr., *American Legal Realism, Skepticism, Reform, and the Judicial Process* (1968); Karl N. Llewellyn, “Some Realism about Realism,” 44 *Harv. L. Rev.* 1222 (1931), is a fundamental statement. On Llewellyn himself, see William Twining, *Karl Llewellyn and the Realist Movement* (1973). In Germany, the “free law movement” can be considered a rough equivalent; see Klaus Riebschläger, *Die Freirechtsbewegung* (1968).

³³ Curiously, the recent attempts of social scientists to find out how judges “really” decide cases has also focused heavily on the personality and values of the judge, to the neglect of litigant pressure and outside social forces, that is, the input side of the law. See Chapter VII, pp. 170–178.

machine. The basic question remains, What is it? What difference does structure make? What difference do the legal professionals make? What independent role does the system play in bending social forces and changing society? Social forces turn into demands which flow in at one end of the system; decisions and rules flow out at the other. How much shall we attribute to the black box in the middle? How does the machine work, and what does it do? Does it act like a membrane through which forces pass without changing form? How important is it, how formative a fact that one society has a legal system of type *X* and another a system of type *Y*? What difference does it make if a system has or does not have a jury? That it elects or appoints its judges? That it has or does not have a federalist system, an adversary system, tribunals instead of courts, barristers as well as solicitors? These are questions about the role of the *structural variable*.

Structure, to be sure, is one basic and obvious element of the legal system. *Substance* (the rules) is another. When an observer tries to describe a legal system in cross section, so to speak, he is likely to speak of these two elements. The *structure* of a system is its skeletal framework; it is the permanent shape, the institutional body of the system, the tough, rigid bones that keep the process flowing within bounds. We describe the *structure* of a judicial system when we talk about the number of judges, the jurisdiction of courts, how higher courts are stacked on top of lower courts, what persons are attached to various courts, and what their roles consist of. The *substance* is composed of substantive rules and rules about how institutions should behave. H. L. A. Hart, indeed, feels that the distinctive feature of a *legal system* is this double set of rules. A legal system is the union of "primary rules" and "secondary rules." Primary rules are norms of behavior; secondary rules are norms *about* those norms—how to decide whether they are valid, how to enforce them, etc.³⁴ Both primary and secondary rules, of course, are outputs of a legal system. They are ways of describing the behavior of the legal system seen in cross section. Litigants behave on the basis of substance; it creates expectations to which they react.

Traditional legal scholarship was certainly familiar with structure and with the two kinds of substance, under one name or another. Yet much of this scholarship seems curiously myopic, at least to a layman. Scholars spoke, argued, and elaborated rules and structures, taking their reality for granted. They tended to ignore the difference between what the words on paper told institutions to do and what they did in fact. In the real world, some rules are not used or are misused, some

³⁴H. L. A. Hart, *The Concept of Law* (1961), pp. 91-92.

structures do not work, others work in strange, noncanonical ways. Structure and substance are real components of a legal system, but they are at best a blueprint or a design, not a working machine. The trouble with traditional structure and substance was that they were static; they were like a still photograph of the legal system—a lifeless image and distorted at that. The picture lacked both motion and truth. The legal system, described solely in terms of formal structure and substance, is like an enchanted courtroom, petrified, immobile, under some odd, eternal spell.

What gives life and reality to the legal system is the outside, social world. The legal system is not insulated or isolated; it depends absolutely on inputs from outside. Without litigants, there would be no courts. Without issues and the will to pursue them, there would be no litigants. These social elements unfreeze the film and start the system in motion.

Social forces are constantly at work on the law—destroying here, renewing there; invigorating here, deadening there; choosing what parts of “law” will operate, which parts will not; what substitutes, detours, and bypasses will spring up; what changes will take place openly or secretly. For want of a better term, we can call some of these forces the legal *culture*. It is the element of social attitude and value. The phrase “social forces” is itself an abstraction; in any event, such forces do not work directly on the legal system. People in society have needs and make demands; these sometimes do and sometimes do not invoke legal process—depending on the culture. Whether a trade union will go on strike, start a revolution, file a lawsuit, bargain collectively, or build a political party depends on many factors. The values and attitudes held by leaders and members are among these factors, since their behavior depends on their judgment about which options are useful or correct. Legal culture refers, then, to those parts of general culture—customs, opinions, ways of doing and thinking—that bend social forces toward or away from the law and in particular ways. The term roughly describes attitudes *about* law, more or less analogous to the *political culture*, which Almond and Verba defined as the “political system as internalized in the cognitions, feelings, and evaluations of its population.”³⁵ The basic notion is that of values and attitudes which,

³⁵Gabriel Almond and Sidney Verba, *The Civic Culture* (1963), p. 14. The term “legal culture” can also be used in an anthropological sense—those traits of behavior and attitude that make the law of one community different from that of another, that make the law of the Eskimos different from French law, ancient Roman law, and the law of the Cambodians. The term can be used in a slightly different way to describe underlying traits of a *whole* legal system—its ruling ideas, its flavor, its style.

when translated into *demands*, start the machinery of the legal system moving or, conversely, stop it in its tracks.³⁶

A legal system in actual operation is a complex organism in which structure, substance, and culture interact. To explain the background and effect of any part calls into play many elements of the system. Let us take, for an example, the incidence and reality of divorce. To begin with, it depends on rules of law. Divorce is a legal concept, and there are countries that do not allow divorce at all. Some rules about divorce, limiting the grounds, for example, will also act to deter divorce. Next, the use of divorce depends on the court *structure*. Lack of nearby courts, expensive court costs, or excessive jurisdictional complexity will discourage divorce. *Structure* and *substance* here are durable features slowly carved out of the landscape by long-run social forces. They modify current demands and are themselves the long-term residue of other social demands. *Legal culture* may also affect the rate of use, that is, attitudes toward whether it is right or wrong, useful or useless, to go to court will also enter into a decision to seek formal divorce. Some people will also be ignorant of their rights or fearful of using them. Values in the general culture will also powerfully affect the rate of use: what relatives or neighbors will think about the divorce; the effect on the children and the children's friends; religious and moral scruples. Such values in the aggregate and over the long haul are responsible for the shape and nature of the divorce laws themselves.

Legal behavior, then, cannot be understood except in context, including the cultural context. The context consists analytically of many elements which yield many sorts of behavioral propositions. First, there are general regularities of behavior—propositions about the way human beings behave, which, if valid, hold true everywhere, every time, and for all kinds of behavior—legal, economic, religious, and the like. For example, rewards and punishments affect behavior in general ways which cut across cultures and times. Second, there are more modest propositions bound to particular cultures or groups of cultures—about demands, for example, that businessmen in a business economy will make on the law. Less sweeping propositions try to explain and predict American or French legal behavior. Many kinds of propositions will be necessary to deal with the law of any society; a shipowner who lives in Greece is human and Greek and a shipowner, and behaves accordingly.

³⁶We will discuss the legal culture further in Chapter VIII.

THE FUNCTIONS OF THE LEGAL SYSTEM

The *output* of law is simply what the legal system produces in response to social demand. Every letter to a congressman, every writ filed in a court, every telephone call to a policeman is a demand on the legal system. Every decision, order, arrest, every bill passed, every elevator inspected is an output or a response. There are millions of demands on the legal system every day. There are also millions of responses. However, one can also speak of output and response in very general terms. These general outputs are the overall *functions* of law, what society expects of the system.

The legal system is not unique in this regard. Every major subsystem in society—the army, the schools—has its function or mission. At the most general level, the function of the legal system is to distribute and maintain an allocation of values that society feels to be right. This allocation, invested with a sense of rightness, is what is commonly referred to as *justice*. Aristotle drew a famous distinction between distributive justice and commutative justice, between the principle by which wealth and honors are allocated among citizens and that which pertains to individual dealings and lawsuits.³⁷ At the core of the concept of justice is the notion of meting out to persons and groups what they deserve, ethically speaking—no more and no less. What this is and how to derive it is a problem with which philosophers of law have wrestled for centuries. We are concerned here with the idea only as a sociological fact—as a mandate imposed by some relevant public upon the legal system. The legal system, in other words, is supposed to guarantee the right or proper (or, perhaps, the least obnoxious) distribution among persons and groups. In individual lawsuits and transactions, the system should apply the right or proper (or, perhaps, the least obnoxious) rule.

Of course, “society” is an abstraction, sometimes a dangerous one. Demands on the legal system do not come from “society” but from specific people, groups, classes, and strata. The “legal system” is an abstraction, too. There are different pieces of the jigsaw puzzle—courts, legislatures, police, city councils, park boards, and administrative agencies. In the short run at least, they respond to different demands, perform rather different functions, and define justice in individual ways. Hence, the legal system may seem to some (or many, or even most) to produce injustice on the whole. Societies are stratified, and the legal system supports the stratification. To those who find the stratifica-

³⁷See Julius Stone, *Human Law and Human Justice* (1965), p. 14.

tion "unjust," the legal system must appear as a parent of injustice.

Another, slightly less global function is the *settlement of disputes*. Conflicts arise in every society. A basic legal function is to offer machinery and a place where people can go to resolve their conflicts and settle their disputes. Of course, the legal system has no monopoly on this function. It belongs as well to parents, teachers, clergymen, employers, and others. Moreover, some societies put more weight on this function than do others. In modern Western countries, for example, people do not generally go to court to settle petty disputes with their neighbors or to iron out disputes within the family; in many smaller and older societies precisely this was done.

Another basic function of the legal system is *social control*—essentially, the enforcement of rules of right conduct. Policemen and judges see to it that thieves are caught and sent to jail. We might call criminal justice primary social control. *Secondary social control*—teaching, admonishing, rehabilitating—is equally important. The thief who is caught and dragged before a court is not merely controlled; he is "taught a lesson." (Whether it works or not is another question.) Courts around the world act or try to act as moral teachers, reformers, and rehabilitators. We associate this function with courts in simpler societies and in the socialist countries; but in many nations, family and juvenile courts at least make a stab at secondary social control. Many agencies and boards try, or should try, to reform sinners and lift the fallen. (In Norway, for example, "temperance boards" have wide powers to help people cope with their alcohol problems.)³⁸ The prisoner in the dock is the immediate subject of "education," but the legal system looks beyond him. It also tries to teach, reform, and rehabilitate members of the audience, onlookers, even those who read about law in the newspapers or hear of it on the street. Indeed, this is what the deterrent value of law is all about, as we shall discuss later on.

Another function of law is to create the norms themselves, the raw materials of social control. Social forces exert pressures; these demands "make" law, but the institutions of the legal system harvest the demands, crystallize them, and turn them into rules, principles, and instructions to civil servants and the general population. In so doing, the legal system may act as an instrument of orderly change, of *social engineering*. The most obvious example is the legislative function. Courts also create rules—especially in the common-law systems, and there are dozens of boards, agencies, commissions, etc. with rule-mak-

³⁸See Nils Christie, "Temperance Boards and Interinstitutional Dilemmas: A Case Study of a Welfare Law," 12 *Social Problems* 415 (1965).

ing power in modern government, many of them with power to direct as well as to control.

Legal institutions also serve a routine or *recording* function. They act as a storehouse or memory for the thousands upon thousands of transactions necessary or desirable in the modern world. They file and keep records; they reduce transactions to efficient routine. When people register deeds, probate a will, or file a death certificate, they make use of this function of law. It is predominantly a characteristic of modern legal systems and the legal systems of the old empires; little or none of this function goes on in tribal systems. Most of this work is in the hands of the bureaucracy, but courts or court-like institutions have a major share in some countries. Sometimes this occurs when once-contested or rarely contested matters have shrunk to mere routine—a name change, for example, a consensual divorce, the probating of a will, or the payment of a traffic fine.

The functions discussed have been simple and matter of fact. It is possible that law, legal process, and the legal system perform other less obviously instrumental functions. Law expresses and defines the norms of the community. This is not the same as the teaching and preaching function of law, since that function has an instrumental end: to change behavior. Sociologists since Émile Durkheim have been intrigued with the symbolic function of the norms of criminal law. Societies, it is said, *need* a concept of deviant behavior. Crime and punishment mark off the moral boundaries of a community. Crime must be punished not only because it is intrinsically dangerous, but also because it offends the solidarity of society—it is an attack on the “common conscience.”³⁹ Kai Erikson feels that “interactions . . . which take place between deviant persons on the one side and official agents of the community on the other” do the “most effective job of locating and publicizing the group’s outer edges.” When the community calls a deviant to account, “it is making a statement about the nature and placement of its boundaries.”⁴⁰

The law, in other words, announces what the rules and standards are and affirms that society can and will punish wrongdoers—those who step over the line. The goal is not suppression for the sake of order, although probably that is the ultimate goal, but suppression for the sake of emblazoning norms upon the consciousness of society. It hardly matters, then, if a few innocent people suffer, so long as what the public

³⁹Émile Durkheim, *The Division of Labor in Society* (1933), p. 103.

⁴⁰Kai T. Erikson, *Wayward Puritans, a Study in the Sociology of Deviance* (1966), pp. 10–11.

sees seems like justice.⁴¹ Still another notion that is sometimes advanced is that criminal law performs a kind of *cathartic* function. Punishment may do nothing for law and order, but it is good for society's soul. It is one way to release aggression and to satisfy in a controlled and controllable way the darker instincts of the human race. This is, of course, only a theory. It is argued on the other side that "punitive control" may actually cause or release through modelling more aggression than it quells.⁴²

LAW AS AN ALLOCATIVE SYSTEM

What is this *justice* that, in the broadest sense, the legal system must produce? The concept, of course, defies definition, and it is the subject of a wide philosophical literature. For our purposes, it refers to expectations and assessments. People in a society expect the law to meet their ethical standards. They will judge it on how it performs. By "performs" we mean, how it treats people and how it distributes its benefits and costs.

Legal decisions are by their very nature economic. They allocate scarce goods and services. The legal system is in this sense a rationing system. What it does and what it is reflects the distribution of power in society—who is on top and who is on the bottom; law also sees to it that this social structure stays stable or changes only in approved and patterned ways. The system issues commands, extends benefits, and tells people what they can or cannot do; in each case, the rule of law, if followed, has made some choice about who has or keeps or gets what good. Rules of law reflect past decisions about allocations. Some conflicts or disputes occurred or threatened to occur between people or groups. Inconsistent wants were expressed. Two men fought over one piece of land. Farmers wanted high prices, consumers wanted low. The resulting legal act (rule or decision) chose among possible alternatives. Very likely it was some kind of compromise, but it was surely an allocation. Every function of the law, general or specific, is allocative. Social control—the monopoly of violence, the maintenance of law and order—is no exception. Who, for example, shall have the right to use force, and when, and why? The rules, once made and enforced, are

⁴¹Social control, too, need not be perfect. It can tolerate some errors, some slippage and cutting of corners, punish some of the innocent, let some of the guilty go—so long as order is maintained, and people do not become too dissatisfied.

⁴²Albert Bandura, *Aggression: A Social Learning Analysis* (1973), pp. 225–227. The last word on the subject has not, of course, been spoken.

templates out of which other rules and decisions are cut; these, of course, perpetuate older allocations or, as we said, change them in patterned ways.

The legal system allocates directly, handing out rewards and punishments. It gives cash subsidies and puts people in jail, but these are not its only tools. There is the market itself which sets prices and disposes of goods and services through private agreements. The law sustains, defines, and limits the area in which the free market operates. It closes off certain kinds of agreement: One cannot legally sell oneself into slavery, or enter into a price-fixing agreement.⁴³ In free-market countries or countries with mixed economies, the law specifies which private agreements can be enforced and which cannot. The law of contract expresses some of the elementary rules; far more important, however, are more specific branches of law, such as labor law and the law of business associations. Law provides even more basic support for the market. The institution of private property rests on pillars of the law. Legal rules provide for registration of land and for gift, sale, and inheritance taxes; legal institutions control banks, banking instruments, money and credit, the operation of the stock market. The system of criminal justice protects property against embezzlement and theft. A market, or mixed, economy decentralizes many economic decisions, but the invisible hand would be paralyzed without the help of legal institutions.

Prices and markets are one way to allocate services and goods. Suppose a popular musician comes to town for one night to play in a hall that seats 1,000; however, ten times this number want to go. Obviously, tickets can be auctioned to the highest bidder, but there are other ways to ration tickets that do not depend upon money.⁴⁴ The management can fix a price and sell on the basis of first come, first served. Some people might stand in line all night in the rain to be sure of getting their tickets. Note that, just as in the "real" market, some people will be "priced out": they cannot afford the time to stand in the queue; they work at night; they live too far from the ticket office; they have small children to take care of; they are too weak and sick to wait in the cold; or the thought of a sleepless night, like a high price, convinces them they can do without the concert.

Often, when society withdraws scarce goods from the "market," they are simply handed over to this time-and-effort "market." This is

⁴³See, in general, Lawrence M. Friedman, *Contract Law in America* (1965), pp. 15-26.

⁴⁴See Guido Calabresi, *The Costs of Accidents* (1970), pp. 114-116.

the "market" for goods with no prices or with fixed prices and limited supplies. Court services themselves are an example. The judge's time is free to the user, but the supply of judges is limited—tragically so in most big cities in the United States. Litigants must therefore "queue"; trials are delayed for months or years. Money cannot buy a valid shortcut (except where the courts are corrupt). The queuing system, it might be added, lends itself easily to corruption—just as rich fans will try to buy tickets to the concert from scalpers. Rules that set up this sort of rationing system, explicitly or not, try to shift rights from people with money to people with patience or time. This is a common outcome of decisions to socialize goods, services, or processes. It is not the only possible result, of course. If the supply is large enough, the queue will shrink or disappear.

In a market, money talks; in a queue, patience and time. A group of other ways to allocate can be conveniently labeled as *merit*. Any agreed-on criterion can serve to define what is merit—physical beauty, strength, wisdom, virtue, or skill. Civil service jobs go to those who score highest on standardized tests; veterans earn pensions by serving. Still other criteria can be labeled *need*. People with large families and small incomes, displaced from their homes by a highway, get first place in the line for public housing. Still other criteria can be called *ascriptive*. They are based on status characteristics—birth, sex, religion, nationality, race. Rules of inheritance of property are ascriptive. So are some of the rules of citizenship. So are the many rules (now happily in retreat) that draw legal lines for or against races, religions, and nationalities in countries all over the world.

Still another way to allocate values or rights or to assign burdens is to let *chance* decide. Chance is an honest, if unpredictable judge. People in everyday life often toss a coin or throw dice, when they cannot make up their mind. Torstein Eckhoff reports that in Sweden and Finland, in the eighteenth and nineteenth century, courts used dice to decide which of two parties to the crime of murder would die and which would suffer lesser punishment. This occurred when the court could not decide which man actually struck the blow that caused death. Folk beliefs demanded that *someone* should die to atone for the victim's death, yet it was unjust to kill more than one. Chance was the criterion chosen, because there was no rational way to decide: "This way of settling the matter served to exempt the judge from taking responsibility for the fateful choice, and at the same time it made manifest that no partiality was involved."⁴⁵

⁴⁵Torstein Eckhoff, "Impartiality, Separation of Powers, and Judicial Independence," 9 *Scandinavian Studies in Law* 9, 16–17 (1965).

A *lottery* is another way to invoke the laws of chance. The lottery reduces every individual to absolute equality of opportunity. Extra investment—of money, patience, time, or labor—has no effect at all on the results, especially if each customer is restricted to a single ticket or chance. Many countries run lotteries to raise money. Other legal uses of a lottery system are less common. A recent, striking example in the United States was the draft lottery. More men were reaching draft age than the army needed. The days of the year were ranked by lottery; only those men whose birthday had a low lottery number were drafted. Any truly arbitrary decision has the same effect as a lottery. When decisions and rules are made mysterious and when processes seem arbitrary to the lay public, the public may imagine that chance is deciding its fate, not principle or reason. Without faith in authority, the formal law can look like a wheel of fortune to the average man. He will not know what to expect of the law and will avoid at all costs a process so capricious and unpredictable.

The *lottery* provides equality of opportunity but not of result. Still another way to allocate is to divide benefits or burdens equally—a straight poll tax, for example. The right to vote is another example; suffrage is divided equally among all competent adults. In theory, as we shall see, many basic civil rights have something of this quality. However, many goods cannot, practically speaking, be divided this way even if one wanted them to be.

Decisions about decisions are among the most important that any society can make. Each such decision has its reasons; each mode of allocation has advantages and disadvantages. How much to rely on markets continues to be vigorously debated—even in socialist countries. The queuing system has its own pluses and minuses. Lotteries, as Guido Calabresi has pointed out, have a real but limited value. They imply a "collective decision that although the collective deciders have no adequate reason for preferring that the activity be done by some people rather than by others . . . they expressly do not want to allow individuals to choose for themselves whether or not to do it."⁴⁶ The draft lottery probably struck many people as much fairer than any alternative. During the American Civil War, people were allowed to buy their way out of the draft; during the Vietnam war, before the lottery was used, there were tremendous local variations, and many complaints about injustice. If a person believes he has a *right* to some legal good, a lottery will strike him as grossly unfair; he will demand his due on the basis of merit or need.

When the law imposes or sustains a market or queuing system, it

⁴⁶Calabresi, *supra* note 44, p. 115.

leaves decisions whether to deal, pay, or queue in private hands. The rules, including rules about jurisdiction, will tilt the likelihood of decision one way or another but leave the door open. The more the tilt, the more the decision is "preformed," that is, presented as a matter of coercion. At the far extreme are the allocative rules which leave nothing to private decision. Such are, for example, the rules of criminal law, but we will argue that the line between preformed and "private" decisions is not so sharp as appears at first glance. A person is "free" to make and break contracts. Murder is forbidden and severely punished; the potential "damages" are extraordinarily high. One *can*, however, decide to pay the price.

In every society, the legal system allows *some* scope to free choice, letting people decide who they will deal with and when to invoke the processes of law. This is true even under absolute monarchs or in totally planned societies. Every society, too, no matter how *laissez-faire*, makes a group of decisions collectively and tries to impose the collective will by force. Indeed, "law" means, among other things, these collective rules and decisions and the means to carry them out. The state or the collective makes these decisions by voting or by authority or command.

One special kind of rule, which we might call *constitutional*, determines the way in which decisions shall be made, but all rules of law, however arrived at, are collective, that is, they determine allocation according to some fixed, preformed scheme. This is the essence of a rule.

In other words, even when legal rules support markets and allow or foster individual choice, the rules themselves are preformed decisions more or less imposed on the population. At the present time, whether the economy or polity of a country is socialist, capitalist, or mixed, inflation of government and rules seems as inevitable as price inflation. The nineteenth-century faith in the invisible hand has dramatically weakened, but what is more important, perhaps, is simply the complexity of modern life. Society seems too interdependent to run by itself; it takes a lot of governing to keep it afloat. Stop lights and policemen are not needed on deserted roads. The alternatives to "law"—custom, habit, pressure of the peers, internalized values, free markets—do not seem efficient, or precise, or fair enough to control the behavior of masses of modern men.