> At the end of the *instruction* [investigation] the accused's lawyer will be given an opportunity to examine the dossier and to make representations before the prosecutor decides whether or not the matter should proceed further. If the prosecutor, on receipt of the dossier from the examining magistrate, believes that the case should proceed, he will transfer the file to the *chambre d'accusation*. This court then assesses the correctness of the decision and thus serves as a further filter in the system. It may order that the case proceed, that it be dropped, that the charges be re-assessed … This court also sits in appeal on refusals of pre-trial liberty and on refusals by the examining magistrate to order investigations into matters suggested by the defence.

Second, cost. Justice Fox says trials in the adversary system are two to 10 times longer than hearings in the investigative system. An International Bar Association conference in Melbourne in 1994 heard a report that a French trial costs about a third to a half that of a common law trial. The investigative system thus convicts at least twice as many serious criminals at half the cost and protects the innocent better.

The Hannes case offers a comparison of the length and cost of criminal trials in the two systems. Simon Gautier Hannes was an executive director of the Macquarie Bank, a Sydney investment bank. He earned about A$2 million a year in salary and bonuses. In 1996 his bank was advising Thomas Nationwide Transport(TNT) in connection with a takeover bid by a Dutch company, KPN. On 9 September 1996. Hannes went to 15 banks. The reporting threshold for cash transactions in Australia is $10,000. At some banks, Hannes got bank cheques of about $9000; at others he withdrew cash from his own accounts. He then put $90,000 into a new account at stockbrokers Ord Minnett in the name of M. Booth. On 17 September, an Ord Minnett broker received instructions by telephone to invest the $90,000 in options over shares in TNT. When KPN's takeover bid became public on 2 October 1996, M. Booth made a profit of $2 million.

Early in 1997, Hannes was charged with insider trading. His defence was that he and a Mr X had set up an investment syndicate, and that Mr X had bought the TNT options without telling him. Hannes did not give evidence and did not produce Mr X, but his lawyers argued that the prosecution could not prove beyond reasonable doubt that Mr X did not exist.

Bron McKillop, of the law school at Sydney University, is an authority on the investigative system. He wrote *Anatomy of a French Murder Case* (Hawkins, 1997), and lectures each year in France and Germany. I asked him how Hannes would have been dealt with in France. He said:

> The investigator (judge, prosecutor or police) would have interrogated Hannes and required 'X' and M. Booth to present themselves for interrogation, failing which the appropriate adverse inference would have been drawn by the investigator, and by the trial court. All the financial transactions would have been established in detail in the dossier. These matters would have been taken

on board through the dossier at the trial, confirmed by oral evidence of the material witnesses and probably also through the interrogation of Hannes by the presiding judge. The trial would probably have lasted a day or so, a week tops, with Hannes almost certainly convicted.

In the adversary system Hannes had a committal hearing, a 55-day trial over 10 months (guilty), a successful appeal, and a 75-day re-trial over 11 months (guilty). He got 2 ½ years and a fine of $100,000. Elisabeth Sexton reported in *The Sydney Morning Herald* of 20 November 2002 that Hannes had spent $3.1 million on legal costs which sometimes reached $13,000 a day. His various court outings cost the public at least $2 million.

Justice Fox compared civil litigation in the two systems. He wrote: 'In a civil action [in the adversary system] a large part of the cost is incurred in the pre-trial phase. This comprises pleadings, court directions, compulsory conferences, discovery and interrogatories, and other matters as the case requires … The whole operation is costly to the parties and to the government as well.' But, he wrote:

> In a civil matter in France, evidence is customarily assembled in written form by one of a court of three judges, and he or she reports to the court on it. The practice is for the reporting judge to accept the evidence presented by the parties and to do little, if any, separate investigation himself. When a witness is called, he is first examined by the President, and counsel for the parties may examine later ('cross-examination' is not a term known to continental jurisprudence.) Few witnesses are called to give oral evidence. Hearings (the correct term, there being no "trials") are without juries and are not concentrated, continuous affairs. The first hearing may occupy no more than one hour, whereupon there can be an adjournment, so that one party or the other may produce further evidence, or for a related purpose. The next hearing may be the final one, and commonly does not last longer than an hour of so. The point for present purposes is that the whole case may be disposed of in less than a day overall; relatively few occupy much more. In other continental countries, and in Japan, the position is much the same. This result is greatly helped by the fact that France, in common with other civil law countries, does not have any exclusionary rules of evidence.

If the French system can dispose of a civil case in a day or two, what can be said of *BCCI v Bank of England,* which recalled *Jarndyce v Jarndyce*, and perhaps even its original, *Jennens v Jennens* (1798-1915)? Creditors of BCCI were claiming £850 million in compensation from the bank for claimed errors and omissions by its officials, and the bank was reported to have allowed £20 million a year for legal fees. That seems wise; before the case even began, arguments over discovery were referred twice to the Court to Appeal and once to the House of Lords, and the opening remarks by Gordon Pollock QC, for BCCI, took 80 sitting days, and those by Nicholas Stadlen QC, for the Old Lady, took 119.

The rapidity of European civil litigation gives the poor and middling some access to justice, while in Anglo-American litigation the time and money wasted on pleadings and discovery prevents access to most except the rich and wealthy corporations.

Since judges do most of the work, investigative systems require roughly six times as many (trained) judges as adversary systems. West Germany had one judge for every 3606 people in 1983 (17,000 in a population of 61,306,700).

Pro-rata, common law countries changing to a WHAT HAPPENED? system would need roughly the following numbers of judges: India: 280,000, USA: 77,000, United Kingdom: 17,000, South Africa: 13,000, Canada: 8900, Australia: 5000, New Zealand: 1100, Ireland: 1100. It would cost US$15.4 billion to pay 77,000 US judges US$200,000 a year.

On the other hand, investigative systems require fewer lawyers. In 1992, Washington (pop. 500,000) had 45,000 lawyers; France (pop. 60 million) had 20,000 lawyers. Reducing the number of lawyers reduces hidden costs. In *Justice in the 21st Century*, Justice Fox quotes a 1989 report to the US Congress which stated:

> Excessive litigation has an adverse effect on economic growth, not only in direct costs but in the way the tort system alters individuals' behaviour. One of the primary factors determining economic growth is technological innovation. To the degree that technological innovation is inhibited by the tort system … economic growth suffers. Stephen Magee, professor of finance at the University of Texas at Austin, estimates that the excess supply of lawyers in the USA reduces economic output by [US]$300 billion to [US]$600 billion.

f. Manifesting the Truth

1. Civil Litigation in Germany

Interestingly, German civil litigation is akin to that in England before lawyers began to get control of the process in the 15th century. Discovery is virtually non-existent; the judge sends for any documents he needs. The approach has been called the 'conference method' of adjudication. The tone, a routine business meeting, lessens tension and theatrics and encourages compromise and settlement. The loser pays system also encourages settlement before judgment.

Professor John Langbein has an overview of the system in *The German Advantage in Civil Procedure* (1985). He noted two fundamental differences between German and Anglo-American civil procedures. First, it is the judge rather than lawyers who mainly gathers and sifts evidence. Second, the judge gathers and evaluates evidence over a series of hearings; there is no distinction between pre-trial and trial, between discovering

evidence and presenting it. The proceedings start with a lawyer making a complaint. The complaint lays out the key facts, a legal theory, and asks for a remedy. Supporting documents are attached or indicated, and witnesses identified. The defendant does the same. German lawyers rarely have contact with witnesses outside the court. This is both a serious ethical breach and self-defeating: German judges explicitly express doubts about the reliability of witnesses who have discussed the case with counsel or who have been seen consorting with the client.

The judge examines the material and sends for public records. He now has the beginning of a dossier; all subsequent evidence-gathering and submissions go into the dossier, and it is continuously open to inspection by the lawyers. The judge calls a hearing and possibly some of the witnesses. He may be able to resolve the case by discussing it with the lawyers and their clients and suggesting avenues of compromise. If the parties persist, he will act as examiner-in-chief of the witnesses. Counsel for either party may then pose additional questions, but in Germany 'counsel are not prominent as examiners'.

In the adversarial process, lawyers choose what aspects of their cases they will put before a passive judge who is ignorant of the facts. Professor Langbein says that in Germany the judge ranges over the entire case, 'constantly looking for the jugular - for the issue of law or fact that might dispose of the case'.

In the adversary system, lawyers are paid by the hour and court reporters by the page. The German incentive is the other way: evidence is rarely recorded verbatim. The judge periodically pauses to dictate a summary into the dossier and the lawyers can suggest improvements. The summaries are useful for quick refreshers at later hearings, and for the written judgment and the appeal court.

Judges sit without a jury and they function without the common law rules of evidence (such as hearsay) that exclude probative evidence. There are no 'saxophones';(Professor Langbein's term for expert witnesses on whom the lawyers who hire them play tunes). If there is a technical problem, the judge, in consultation with the lawyers, selects the expert or experts and defines their role. The lawyers can comment orally or in writing when the judge has heard witnesses or procured other evidence, and can suggest further proofs or advance legal theories.

'Thus,' says Professor Langbein, 'non-adversarial proof-taking alternates with adversarial dialogue across as many hearings as necessary. The process merges the investigatory function of our pre-trial discovery and evidence-presenting function of our trial.'

2. Criminal Pre-Trial in France

In serious cases, overworked investigating magistrates do much of the work. They supervise detectives (and hence reduce fabrication), reconstruct the crime, stage a confrontation between suspect and victim or relatives, and build up a dossier of all relevant evidence for and against the suspect.

The suspect is seen as a valuable source of information and he generally accepts this, despite the right of silence. The dossier is made available to the suspect's lawyer in case he can show the truth lies elsewhere. If he can show there is considerable doubt, that is the end of it.

3. Criminal Trial in France

At trial, the jurors, if any, sit on the bench with the judge or judges. Guilty pleas are not accepted; it is the task of judge and jurors to find out for themselves the truth of the matter. The presiding judge uses the dossier to question as many witnesses as necessary for 'the manifestation of the truth'. Witnesses can tell the whole truth by giving their evidence as a narrative rather than by Yes-No answers.

The accused in not on oath. His life, character and previous convictions are presented. He has a right to remain silent, but adverse inferences can be drawn if he refuses to give evidence.

Lawyers for prosecution and defence can question witnesses but in some jurisdictions only through the judge; they are not allowed to cross-examine directly lest they pollute the truth.

On the standard of proof, Bron McKillop says there is probably no real difference between beyond reasonable doubt and the European 'conviction of guilt', the French *conviction intime* and the German *freie uberzeugung*. A doubt must be resolved in favour of the accused. While the English formula is negative and confusing; French jurors understand what 'intimately [thoroughly] convinced' means.

Judge(s) and jurors reach the verdict and penalty together and give their reasons. There is no double-jeopardy rule; the prosecution can appeal against not guilty verdicts.

Trial results automatically go to appeal courts for review. The dossier helps the appellate judges to scrutinise the lower court's reasoning, application of the law and findings of fact. A drawback is that the evidence of witnesses at the trial is not reviewed because it is not recorded in the dossier.

The investigative system thus generally destroys any claim that the adversary system is fairer to accused. Professor Gordon van Kessel said in *Adversary excesses in the American criminal trial* (*Notre Dame Law Review*, 1992):

It is arguable that by allowing the defendants full discovery of the state's case, an opportunity to give unsworn narrative testimony, and a right to written reasons supporting the fact-finder's decision, the non-adversary system shows greater respect for the accused.

g. Tide Turns against the Adversary System

US Chief Justice (1969-86) Warren Burger told the American Bar Association in 1984:

> Trials by the adversarial contest must in time go the way of the ancient trial by battle and blood. Our system is too costly, too painful, too destructive, too inefficient for a truly civilized people.

Judge Burton Katz said in *Justice Overruled*:

> A system that exalts a criminal's rights over the victim's, procedure over substance, and adversarial supremacy over the quest for truth and justice is on the verge of moral bankruptcy. It will not survive, because the people will not support it.

A Queensland appellate judge, Geoffrey Davies, wrote in *The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System* (Australian Institute of Judicial Administration, 2002):

> Two related misapprehensions have inhibited change to our civil justice system. The first of these is a belief that our traditional civil justice system has, over time, developed the best means of ascertaining the truth and of achieving fairness between the parties. And the second … is a perception that the civil systems of Europe are so different from ours and so inferior to ours in each of those important respects that nothing can be gained by borrowing from them.

In 2004, the Australian Family court was experimenting with a largely lawyer-free investigative system for custody cases.

In India, which has two-thirds of the 1.6 billion people affected by the adversary system, a committee recommended change to an investigative criminal system in April 2003. The committee consisted of the chairman, Justice V.S. Malimath, former Chief Justice of the Karnataka and Kerala High Courts, and D.V. Subba Rao, Chairman of the Bar Council of India, N.R. Madhava Menon, Vice-Chancellor of the West Bengal National University of Juridical Sciences, Amitabh Gupta, former Director-General of Police, Rajasthan, S. Varadachary, former Adviser to the Planning Commission of India, and Durgadas Gupta, Joint Secretary in the Ministry of Home Affairs.

Justice Malimath said that at the core of the report was the 'duty of the court to search for truth'. The report recommended that judges be

empowered to summon and examine any person they consider appropriate. It said the system had to be amended to give judges the power to examine and cross-examine the accused at trial, and to draw adverse inferences if he refuses to answer.

Presenting the report, Justice Malimath said the criminal justice system was weighted in favour of the accused and did not adequately focus on justice for victims of crime. The committee had therefore recommended that the victim should be given the right to take part in serious criminal cases with a penalty of seven years or more.

India's Malimath inquiry into the criminal justice system was thus profoundly better than Britain's Runciman inquiry, but as of October 2005 Indian lawyers and misguided allies were still fighting a rearguard action to stop changing to a moral system.

h. Convergence?

In April 2005, the British Labor Government, headed by barrister Tony Blair, was reported to be demanding the right to veto European Union decisions affecting taxation, defence, social security, justice, and foreign affairs. However, there is talk in Europe and England of 'convergence' between the two systems. It might seem impossible for a pro-truth system run by trained judges to converge with an anti-truth system run by serial lairs, but a small compromise on cross-examination might allow the English legal establishment to claim the inquisitorial system has become more adversarial.

The suggested compromise is the method adopted by the Hon Gerald Fitzgerald QC and Justice James Wood when they ran major commissions of inquiry in Australia. The commissioner allowed lawyers for suspects to cross-examine for as long as he believed they were helping him find the truth, and sat them down abruptly when they started to use their old tricks to obscure it.

i. Conclusion

Fairness, justice and morality require a search for truth. The adversary version of the Dark Ages PROVE IT! system does not seek the truth; the process is controlled by lawyers who claim ethical obligations to lie and pervert justice; untrained former lawyers prone to the Humpty Option control courtrooms; civil law is in part unfair to business, industry, the professions, the media, and the public; criminal law is unfair to victims, relatives, detectives, prosecutors, witnesses, jurors, and to a public totalling 1,600,000,000.

The European system is not perfect, but it is everything the adversary system is not. It seeks the truth; judges are trained, and trained separately

from lawyers, and they control the pre-trial and trial process; the system is generally fair to both sides, accused and public; it does not conceal relevant evidence; it does not allow barristers to pollute the truth in cross-examination; jurors and judges sit together on the bench and give reasons for their verdict and penalty. It puts away 90% of criminals against the adversary system's fewer than 50%.

In the English-speaking world, the case for change to a moral system is unanswerable. It will happen when common lawyers in legislatures learn to fear outraged voters more than they love a corrupt system.

Acknowledgments

Many lawyers and judges have helped, wittingly or unwittingly, in the compilation of this book, e.g. Professor Arthur Applbaum on serial liars, Justice Russell Fox on the nature of justice and much else, Judge Richard Posner on the cartel, Nicholas Mullany on pleadings, and Paul Mendelow on discovery, Brett McKillop for details of the European system. I am indebted to Mr Richard Ackland, the distinguished proprietor of the online legal journal, *Justinian*, for encouraging me to try to comprehend the incomprehensible 26 times a year, to Elizabeth O'Brien for help in preparing the work for publication, and to Rose Lennon for the shark on the cover. Most particularly, I should acknowledge Brett Dawson for his unfailingly generous help on technical aspects of the law. A former New Zealand prosecutor, defence counsel, and academic, he is author of *The Evil Deeds of the Ratbag Profession in the Criminal Justice System* (1998), and president of Australian Justice and Reform Inc (www.ajaronline.com).

Definitions

Abuse of process. *Butterworths*: 'The misuse or unjust or unfair use of court process and procedure … generally any process that gives rise to unfairness … Criminal contempt of court through abuse of the court's process … includes serious misconduct such as … intentionally deceiving the court …' The definitions imply that the adversary system itself is an abuse of process.

Accusatorial (PROVE IT!) System. A accuses B; B says: 'Prove it'. It was used in Europe and England from the Dark Ages until early in the 13th century. Since then, the Dark Ages system has been used only in England and its colonies.

Adversary System. An anti-truth accusatorial system in which lawyers control the evidence, the process, and the money, and untrained judges control the court. English judges began to let lawyers take control of the civil process in the 15th century and of the criminal process in the 18th century.

Bagman. A collector/distributor of bribes/extortions, e.g. the Duke of Newcastle, Chicago lawyers who collected judges' extortions.

Cartel, The. A syndicate of common lawyers and judges first formed about 1180 to maximize their profits.

Civil Law. The law of the people. Codified criminal and civil law deriving from Roman law and used in European countries, their former colonies, and Japan and South Korea with a total population of c.1.6 billion.

Common law. Cartel-made law used in England and its former colonies, including the USA, Canada, India, New Zealand and Australia, with a total population of c.1.6 billion, of whom some three million are lawyers.
Conversion rate. Historian Roy Porter said that multiplying 18th century English pounds by 100 gives a rough equivalent of their value today.
Corruption. A euphemism for organised crime, usually in the public sector.
Criminal Enterprise, A. The vehicle through which organised crimes are committed, e.g. a court system in the case of judicial extortion; the Roman, British and US empires; and the Gambino Mafia family.
Dickens Principle. 'The one great principle of the English law is to make business for itself', i.e. trial lawyers.
Ethics. 'A system of moral principles, by which human actions and proposals may be judged good or bad or right or wrong.' – Macquarie Dictionary. In the adversary system, legal ethics are client-based rather than morality-based.
Humpty Option, The. Judges' power to assert that words have meanings different from their real meanings, e.g. 'absolutely' does not mean 'absolutely'. The option derives from *Through the Looking Glass, and What Alice Found There*.
Investigative (Inquisitorial/WHAT HAPPENED?) System. A pro-truth system in which trained judges control the court and the process. Used by civil law countries since early in the 13th century.
Justice. This book accepts former Justice Russell Fox's definition: justice means fairness, fairness means truth, and the search for truth gives a justice system its necessary moral dimension.
Kleptocracy. Literally, rule by thieves; a euphemism for rule by organised criminals.
Law Lords. Lords of Appeal in Ordinary; life peers who are members of England's highest appeal court, the Judicial Committee of the House of Lords.
Legal Fiction. A lie, e.g. Australia was 'deemed' to be uninhabited when a British criminal enterprise invaded the country and stole the land.
Lord Chancellor. A politician who was head of the UK judiciary until 2003.
Magnates. The 'great men of the realm'; originally 300 organised criminals to whom William the Conqueror gave a large part of England after he took control in 1066.
Manuel Test, The. 'A fair go all round'. From a 1971 statement by NSW Conciliation Commissioner Gilbert Manuel.
Master of the Rolls. Head of England's second-highest court, the Court of Appeal.
Organised crime. Systematic criminal activity for money or power.
Organised Criminal. Title IX of the US Organized Crime Control Act (1970) defines an organised criminal as one who exhibits a pattern (over 10

years) of two or more chargeable offences (not necessarily convictions) which carry penalties of at least a year in prison.
Parties. Clients in civil litigation. A legal fiction says the parties rather than their lawyers control the process.
Probative. Tending to prove guilt.
RICO. Racketeer-Influenced and Corrupt Organizations (Title IX of the US Organized Crime Control Act of 1970). RICO is an exception to the rule against evidence of a pattern of criminal behaviour. It applies to all organised criminals, including businessmen, judges and lawyers, and members of the Mafia.
Rule of Law, The. A legal fiction. It holds that all persons and organisations, including governments, are subject to the same laws.
Saxophones. Expert witnesses. Law professor John Langbein says trial lawyers play tunes on expert witnesses they hire.
Trial (Litigation) Lawyers. Lawyers who do court work, some 40% of the total, i.e. most barristers and about 30% of solicitors. In this book 'lawyers' usually refers to trial lawyers.

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THE WEST'S TWO LEGAL SYSTEMS

The Anglo-American adversary system daily subverts truth, fairness, justice, and morality, but self-interest and intellectual torpor inhibit inquiry into what precisely is wrong, how it happened, and the solution.

What's wrong is simple enough. The system does not search for the truth, and trial lawyers, described as serial liars by a Harvard ethicist, control the evidence, and hence the process, and hence the money.

How it happened is also quite simple. Untrained British judges allowed trial lawyers to take control of the civil process in the 17th century, and of the criminal process early in the 19th. Since then, lawyers and judges have invented a series of anti-truth devices which make it relatively easy for trial lawyers to get rich criminals off.

As for the solution, an Australian judge says justice is fairness, fairness is truth, truth is reality, and the search for truth gives a justice system its necessary moral dimension. The European investigative system searches for the truth and trained judges control the process.

In short, the Anglo-American system is largely about money; the European system is largely about truth.

Evan Whitton has been exploring the two systems since 1991, when the adversary system concealed compelling evidence the European system had found against an organised criminal, Sir Terence Lewis.

Cover illustration by Rose Lennon.

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WOE UNTO YOU, LAWYERS!

A lusty, gusty attack on “The Law” as a curious, antiquated institution which, through outworn procedures, technical jargon and queer mummery, enables a group of medicine-men to dominate our social and political lives and our business, to their own gain.

FRED RODELL

Professor of Law, Yale University

Written in 1939

“Woe unto you, lawyers! For ye have taken away
the key of knowledge: ye entered not in yourselves,
and them that were entering in ye hindered.” — Luke. XI, 52

Contents

Preface

No lawyer will like this book. It isn’t written for lawyers. It is written for the average man and its purpose is to try to plant in his head, at the least, a seed of skepticism about the whole legal profession, its works and its ways.

In case anyone should be interested, I got my own skepticism early. Before I ever studied law I used to argue occasionally with lawyers – a foolish thing to do at any time. When, as frequently happened, they couldn’t explain their legal points so that they made any sense to me I brashly began to suspect that maybe they didn’t make any sense at all. But I couldn’t know. One of the reasons I went to law school was to try to find out.

WOE UNTO YOU, LAWYERS!

At law school I was lucky. Ten of the men under whom I took courses were sufficiently skeptical and common-sensible about the branches of law they were teaching so that, unwittingly of course, they served together to fortify my hunch about the phoniness of the whole legal process. In a sense, they are the intellectual godfathers of this book. And though all of them would doubtless strenuously disown their godchild, I think I owe it to them to name them. Listed alphabetically, they are:

Thurman Arnold, now Assistant Attorney-General of the United States; Charles E. Clark, now Judge of the U.S. Circuit Court of Appeals; William O. Douglas, now Justice of the U.S. Supreme Court; Felix Frankfurter, now Justice of the U.S. Supreme Court; Leon Green, now Dean of the Northwestern University Law School; Walton Hamilton, Professor of Law at Yale University; Harold Laski, Professor of Political Science at the London School of Economics; Richard Joyce Smith, now a practicing attorney in New York City; Wesley Sturges, now Director of the Distilled Spirits Institute; and the late Lee Tulin.

By the time I got through law school, I had decided that I never wanted to practice law. I never have. I am not a member of any bar. If anyone should want, not unreasonably, to know what on earth I am doing – or trying to do – teaching law, he may find a hint of the answer toward the end of Chapter IX.

When I was mulling over the notion of writing this book, I outlined my ideas about the book, and about the law, to a lawyer who is not only able but also extraordinarily frank and perceptive about his profession. “Sure,” he said, “but why give the show away?” That clinched it.

F.R.

CHAPTER I

MODERN MEDICINE-MEN

“*The law is a sort of hocus-pocus science*.” Charles Macklin

In TRIBAL TIMES, there were the medicine-men. In the Middle Ages, there were the priests. Today there are the lawyers. For every age, a group of bright boys, learned in their trade and jealous of their learning, who blend technical competence with plain and fancy hocus-pocus to make themselves masters of their fellow men. For every age, a pseudo-intellectual autocracy, guarding the tricks of its trade from the uninitiated, and running, after its own pattern, the civilization of its day.

WOE UNTO YOU, LAWYERS!

It is the lawyers who run our civilization for us – our governments, our business, our private lives. Most legislators are lawyers; they make our laws. Most presidents, governors, commissioners, along with their advisers and brain-trusters are lawyers; they administer our laws. All the judges are lawyers; they interpret and enforce our laws. There is no separation of powers where the lawyers are concerned. There is only a concentration of all government power – in the lawyers. As the schoolboy put it, ours is "a government of lawyers, not of men."

It is not the businessmen, no matter how big, who run our economic world. Again it is the lawyers, the lawyers who "advise" and direct every time a company is formed, every time a bond or a share of stock is issued, almost every time material is to be bought or goods to be sold, every time a deal is made. The whole elaborate structure of industry and finance is a lawyer-made house. We all live in it, but the lawyers run it.

And in our private lives, we cannot buy a home or rent an apartment, we cannot get married or try to get divorced, we cannot die and leave our property to our children without calling on the lawyers to guide us. To guide us, incidentally, through a maze of confusing gestures and formalities that lawyers have created.

Objection may be raised immediately that there is nothing strange or wrong about this. If we did not carry on our government and business and private activities in accordance with reasoned rules of some sort we would have chaos, or else a reversion to brute force as the arbiter of men's affairs. True – but beside the point. The point is that it is the lawyers who make our rules and a whole civilization that follows them, or disregards them at its peril. Yet the tremendous majority of the men who make up that civilization, are *not* lawyers, pay little heed to how and why the rules are made. They do not ask, they scarcely seem to care, which rules are good and which are bad, which are a help and which a nuisance, which are useful to society and which are useful only to the lawyers. They shut their eyes and leave to the lawyers the running of a large part of their lives.

Of all the specialized skills abroad in the world today, the average man knows least about the one that affects him most – about the thing that lawyers call The Law. A man who will discourse at length about the latest cure for streptococci infection or describe in detail his allergic symptoms cannot begin to tell you what happened to him legally – and plenty did – when he got married. A man who would not dream of buying a car without an intricate and illustrated description of its mechanical workings will sign a lease without knowing what more than four of its forty-four clauses mean or why they are there. A man who will not hesitate to criticize or disagree with a trained economist or an expert in any one of a dozen fields of learning will follow, unquestioning and meek, whatever advice his lawyer gives

him. Normal human scepticism and curiosity seem to vanish entirely whenever the layman encounters The Law.

There are several reasons for this mass submission, One is the average man's fear of the unknown – and of policemen. The law combines the threat of both. A non-lawyer confronted by The Law is like a child faced by a pitch-dark room. Merciless judges lurk there, ready to jump out at him. ("Ignorance of the law is no defense.") Cowed and, perforce, trusting, he takes his lawyer's hand, not knowing what false step he might make unguided, nor what punishment might then lie in wait for him. He does not dare display either skepticism or disrespect when he feels that the solemn voice of the lawyer, telling him what he must or may not do, is backed by all the mighty and mysterious forces of law-and-order from the Supreme Court on down on the cop on the corner.

Then, too, every lawyer is just about the same as every other lawyer. At least he has the same thing to sell, even though it comes in slightly different models and at varying prices. The thing he has to sell is The Law. And it is as useless to run from one lawyer to another in the hope of finding something better or something different or something that makes more common sense as it would be useless to run from one Ford dealer to another if there were no Chevrolets or Plymouths or even bicycles on the market. There is no brand competition or product competition in the lawyers' trade. The customer has to take The Law or nothing. And if the customer should want to know a little more about what he's buying – buying in direct fees or indirect fees or taxes – the lawyers need have no fear of losing business or someone else if they just plain refuse to tell.

Yet lawyers can and often do talk about their product without telling anything about it at all. And that fact involves one of the chief reasons for the non-lawyer's persistent ignorance about The Law. Briefly, The Law is carried on in a foreign language. Not that it deals, as do medicine and mechanical engineering, with physical phenomena and instruments which need special words to describe them simply because there are no other words. On the contrary, law deals almost exclusively with the ordinary facts and occurrences of everyday business and government and living. But it deals with them in a jargon which completely baffles and befoozles the ordinary literate man, who has no legal training to serve him as a trot.

Some of the language of the law is built out of Latin or French words, or out of old English words which, but for the law, would long ago have fallen into disuse. A common street brawl means nothing to a lawyer until it has been translated into a "felony," a "misdemeanor," or a "tort"; and any of those words, when used by a lawyer, may mean nothing more than a common street brawl. Much of the

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language of the law is built out of perfectly respectable English words which have been given a queer and different and exclusively legal meaning. When a lawyer speaks, for instance, of "consideration" he is definitely not referring to kindness. All of the language of the law is such, as Mr. Dooley once put it, that a statute which reads like a stone wall to the lawman becomes, for the corporation lawyer, a triumphal arch. It is, in short, a language that nobody but a lawyer understands. Or could understand -–if we are to take the lawyers' word for it.

For one of the most revealing things about the lawyers' trade is the unanimous inability or unwillingness, or both, on the part of the lawyers to explain their brand of professional pig Latin to men who are not lawyers. A doctor can and will tell you what a metatarsus is and where it is and why it is there and, if necessary, what is wrong with it. A patient electrician can explain, to the satisfaction of a medium-grade mentality, how a dynamo works. But try to pin down a lawyer, any lawyer, on "jurisdiction" or "proximate cause" or "equitable title" – words which he tosses off with authority and apparent familiarity and which are part of his regular stock in trade. If he does not dismiss your question summarily with "You're not a lawyer' you wouldn't understand," he will disappear into a cloud of legal jargon, perhaps descending occasionally to the level of a non-legal abstraction or to the scarcely more satisfactory explanation that something is so because The Law says that it is so. That is where you are supposed to say, "I see."

It is this fact more than any other – the fact that lawyers can't or won't tell what they are about in ordinary English – that is responsible for the hopelessness of the non-lawyer in trying to cope with or understand the so-called science of law. For the lawyers' trade is a trade built entirely on words. And so long as the lawyers carefully keep to themselves the key to what those words mean, the only way the average man can find out what is going on is to become a lawyer, or at least to study law, himself. All of which makes it very nice – and very secure – for the lawyers.

Of course any lawyer will bristle, or snort with derision, at the idea that what he deals in is words. He deals, he will tell you, in propositions, concepts, fundamental principles – in short, in ideas. The reason a non-lawyer gets lost in The Law is that his mind has not been trained to think logically about abstractions, whereas the lawyer's mind has been so trained. Hence the lawyer can leap lightly and logically from one abstraction to another, or narrow down a general proposition to apply to a particular case, with an agility that leaves the non-lawyer bewildered and behind. It is a pretty little picture.

Yet it is not necessary to go into semantics to show that it is a very silly little picture. No matter what lawyers deal *in*, the thing they deal *with* is exclusively the

stuff of living. When a government wants to collect money and a rich man does not want to pay it, when a company wants to fire a worker and the worker wants to keep his job, when an automobile driver runs down a pedestrian and the pedestrian says it was the driver's fault and the driver says it wasn't – these things are living facts, not airy abstractions. And the only thing that matters about the law is the way it handles these facts and a million others. The point is that legal abstractions mean nothing at all until they are brought down to earth. Once brought down to earth, once applied to physical facts, the abstractions become nothing but words – words by which lawyers describe, and justify, the things that lawyers do. Lawyers would always like to believe that the principles they say they work with are something more than a complicated way of talking about simple, tangible, non-legal matters; but they are not. Thus the late Justice Holmes was practically a traitor to his trade when he said, as he did say, "General propositions do not decide concrete cases."

To dismiss the abstract principles of The Law as being no more, in reality, than hig-sounding combinations of words may, in one sense, be a trifle confusing. Law in action does, after all, amount to the application of rules to human conduct; and rules may be said to be, inevitably, abstractions themselves. But there is a difference and a big one. "Anyone who pits on this platform will be fined five dollars" is a rule and, in a sense, an abstraction; yet it is easily understood, it needs no lawyer to interpret it, and it applies simply and directly to a specific factual thing. But "Anyone who willfully and maliciously spits on this platform will be fined five dollars" is an abstraction of an entirely different color. The Law has sneaked into the rule in the words "willfully and maliciously." Those words have no real meaning outside of lawyers' minds until someone who spits on the platform is or is not fined five dollars – and they have none afterward until someone else spits on the platform and does or does not get fined.

The whole of The Law – its concepts, its principles, its propositions – is made up of "willfullys" and "maliciouslys," of words that cannot possibly be pinned down to a precise meaning and that are, in the last analysis, no more than words. As a matter of fact, the bulk of The Law is made up of words with far less apparent relation to reality than "willfully" or "maliciously." And you can look through every bit of The Law – criminal law, business law, government law, family law – without finding a single rule that makes as much simple sense as "Anyone who spits on this platform will be fined five dollars."

That, of course, is why a non-lawyer can never make rhyme or reason out of a lawyer's attempted explanation of the way The Law works. The non-lawyer wants the whole business brought down to earth. The lawyer cannot bring it down to earth without, in so doing, leaving The Law entirely out of it. To say that Wagner Labor Act was held valid because five out of the nine judges on the Supreme Court

approved of it personally, or because they thought it wiser policy to uphold it than to risk further presidential agitation for a change in the membership of the Court – to say this is certainly not to explain The Law of the case. Yet to say this makes a great deal more sense to the layman and comes a great deal closer to the truth than does the legal explanation that the Act was held valid because it constituted a proper exercise of Congress' power to regulate interstate commerce. You can probe the words of that legal explanation to their depths and bolster them with other legal propositions dating back one hundred and fifty years and they will still mean, for all practical purposes, exactly nothing.

There is no more pointed demonstration of the chasm between ordinary human thinking and the mental processes of the lawyer than in the almost universal reaction of law students when they first encounter The Law. They come to law school a normally intelligent, normally curious, normally receptive group. Day in and day out they are subjected to the legal lingo of judges, textbook writers, professors – those learned in The Law. But for months none of it clicks; there seems to be nothing to take hold of. These students cannot find anywhere in their past knowledge or experience a hook on which to hang all this strange talk of "mens rea" and "fee simple" and "due process" and other unearthly things. Long and involved explanations in lectures and lawbooks only make it all more confusing. The students know that law eventually deals with extremely practical matters like buying land and selling stock and putting thieves in jail. But all that they read and hear seems to stem not only from a foreign language but from a strange and foreign way of thinking.

Eventually their confusion founded though it is in stubborn and healthy skepticism is worn down. Eventually they succumb to the barrage of principles and concepts and all the metaphysical refinements that go with them. And once they have learned to talk the jargon, once they have forgotten their recent insistence on matters-of-factness, once they have begun to glory in their own agility at that mental hocus-pocus that had them befuddled a short while ago, then they have become, in the most important sense, lawyers. Now they, too, have joined the select circle of those who can weave a complicated intellectual riddle out of something so mundane as a strike or an automobile accident. Now it will be hard if not impossible ever to bring them back tot hat disarmingly direct way of thinking about the problems of people and society which they used to share with the average man before they fell in with the lawyers and swallowed The Law.

Learning the lawyers' talk and the lawyers' way of thinking – learning to discuss the pros and cons of, say, pure food laws in terms of "affectation with a public contract" – is very much like learning to work cryptograms or play bridge. It requires concentration and memory and some analytic ability, and for those who

become proficient it can be a stimulating intellectual game. Yet those who work cryptograms or play bridge never pretend that their mental efforts, however difficult and involved, have any significance beyond the game they are playing. Whereas those who play the legal game not only pretend but insist that their intricate ratiocination's in the realm of pure thought have a necessary relation to the solution of practical problems. It is through the medium of their weird and wordy mental gymnastics that the lawyers lay down the rules under which we live. And it is only because the average man cannot play their game, and so cannot see for himself how intrinsically empty-of-meaning their playthings are, that the lawyers continue to get away with it.

The legal trade, in short, is nothing but a high-class racket. It is a racket far more lucrative and more powerful and hence more dangerous than any of those minor and much-publicized rackets, such as ambulance-chasing or the regular defense of known criminals, which make up only a tiny part of the law business and against which the respectable members of the bar are always making speeches and taking action. A John W. Davis, when he exhorts a court in the name of God and Justice and the Constitution – and, incidentally, for a fee – not to let the federal government regulate holding companies, is playing the racket for all it is worth. So is a Justice Sutherland when he solemnly forbids a state to impose an inheritance tax on the ground that the transfer – an abstraction – of the right to get dividends – another abstraction – did not take place *geographically* inside the taxing state. And so, for that matter, are all the Corcorans and Cohens and Thurman Arnolds and the rest, whose chief value to the New Deal lies not in their political views nor even in their administrative ability but rather in their adeptness at manipulating the words of The Law so as to make things sound perfectly proper which other lawyers, by manipulating different words in a different way, maintain are terribly improper. The legal racket knows no political or social limitations.

Furthermore, the lawyers – or at least 99 44/100 per cent of them – are not even aware that they are indulging in a racket, and would be shocked at the very mention of the idea. Once bitten by the legal bug, they lose all sense of perspective about what they are doing and how they are doing it. Like the medicine men of tribal times and the priests of the Middle Ages they actually believe in their own nonsense. This fact, of course, makes their racket all the more insidious. Consecrated fanatics are always more dangerous than conscious villains. And lawyers are fanatics indeed about the sacredness of the word-magic they call The Law.

Yet the saddest and most insidious fact about the legal racket is that the general public doesn't realize it's a racket either. Scared, befuddled, impressed and ignorant, they take what is fed them, or rather what is sold them. Only once an age

do the non-lawyers get, not wise, but disgusted, and rebel. As Harold Laski is fond of putting it, in every revolution the lawyers lead the way to the guillotine or the firing squad.

It should not, however, require a revolution to rid society of lawyer-control. Nor is riddance by revolution ever likely to be a permanent solution. The American colonists had scarcely freed themselves from the nuisances of The Law by practically ostracizing the pre-Revolutionary lawyers out of their communities – a fact which is little appreciated – when a new and home-made crop of lawyers sprang up to take over the affairs of the baby nation. That crop, 150 years later, is still growing in numbers and in power.

What is really needed to put the lawyers in their places and out of the seats of the mighty is no more than a slashing of the veil of dignified mystery that now surrounds and protects The Law. If people could be made to realize how much of the vaunted majesty of The Law is a hoax and how many of the mighty processes of The Law are merely logical legerdemain, they would not long let the lawyers lead them around by the nose. And people have recently begun, bit by bit, to catch on. The great illusion of The Law has been leaking a little at the edges.

There was President Roosevelt's plan to add to the membership of the Supreme Court, in order to get different decisions. Even those who opposed the plan – and they of course included almost all the lawyers – recognized, by the very passion of their arguments, that the plan would have been effective: in other words, that by merely changing judges you could change the Highest Law of the Land. And when the Highest Law of the Land was changed without even changing judges, when the same nine men said that something was constitutional this year which had been unconstitutional only last year, then even the most credulous of laymen began to wonder a little about the immutability of The Law. It did not add to public awe of The Law either when Thomas Dewey's grand-stand prosecution of a Tammany hack was suddenly thrown out of court on a technicality so piddling that every newspaper in New York City raised an editorial howl – against a more or less routine application of The Law. And such minor incidents as the recent discovery that one of Staten Island's leading law practitioners had never passed a bar examination, and so was not, officially, a lawyer, do not lend themselves to The Law's prestige.

Yet it will take a great deal more than a collection of happenings like these to break down, effectively, the superstition of the grandeur of The Law and the hold which that superstition has on the minds of most men. It will take some understanding of the wordy emptiness and irrelevance of the legal process itself. It will take some cold realization that the inconsistencies and absurdities of The Law

that occasionally come into the open are not just accidents but commonplaces. It will take some awakening to the fact that training in The Law does not make lawyers wiser than other men, but only smarter.

Perhaps an examination of the lawyers and their Law, set down in ordinary English, might help achieve these ends. For, despite what the lawyers say, it *is* possible to talk about legal principles and legal reasoning in everyday non-legal language. The point is that, so discussed, the principles and the reasoning and the whole solemn business of The Law come to look downright silly. And perhaps if the ordinary man could see in black and white how silly and irrelevant and unnecessary it all is, he might be persuaded, in a peaceful way, to take the control of his civilization out of the hands of those modern purveyors of streamlined voodoo and chromium-plated theology, the lawyers.

CHAPTER II

THE LAW OF THE LAWYERS

"*The law is the true embodiment*
Of everything that's excellent.
It has no kind of fault or flaw." — W.S. Gilbert

The Law is the killy-loo bird of the sciences. The killy-loo, of course, was the bird that insisted on flying backward because it didn't care where it was going but was mightily interested in where it had been. And certainly The Law, when it moves at all, does so by flapping clumsily and uncertainly along, with its eye unswervingly glued on what lies behind. In medicine, in mathematics, in sociology, in psychology – in every other one of the physical and social sciences – the accepted aim is to look ahead and then move ahead to new truths, new techniques, new usefulness. Only The Law, inexorably devoted to all its most ancient principles and precedents, makes a vice of innovation and a virtue of hoariness. Only The Law resists and resents the notion that it should ever change its antiquated ways to meet the challenge of a changing world.

It is well-nigh impossible to understand how The Law works without fully appreciating the truth of this fact: — The Law never admits to itself that there can be anything actually new under the sun. Minor variations of old facts, old machines, old relationships, yes; but never anything different enough to bother The Law into treating it otherwise than as an old friend in a new suit of clothes. When corporations first came on the legal scene, The Law regarded them as individual persons, in disguise, and so, for most legal purposes, a corporation is still considered, and even talked about, as a "person." A transport airplane, so far as

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The Law is concerned, is nothing but a newfangled variety of stagecoach. Such things as sit-down strikes, holding companies, Paris divorces, were treated with almost contemptuous familiarity by The Law when they first appeared, and the same fate undoubtedly awaits television when it grows up and begins to tangle with The Law. For all this is part of a carefully nurtured legend to the effect that The Law is so omniscient that nothing men may do can ever take it unawares, and so all-embracing that the principles which will apply to men's actions 500 years from now are merely waiting to be applied to whatever men happen to be doing in 2439 A.D.

What The Law purports to be is a tremendous body of deathless truths so wide in scope and so infinite in their variations that they hold somewhere, and often hidden, within their vastnesses the solution of every conceivable man-made dispute or problem. Of course the truths are phrased as abstract principles, and the principles are phrased in the strange lingo of The Law. And so only the lawyers – especially those who have become judges or ordained interpreters of The Words – can ever fish the proper solution out of The Law's vastnesses. But it is the very keystone of the whole structure of legal mythology to insist that all earthly problems can and must be solved by reference to this great body of unearthly abstractions – or, in short, that they can and must be solved by the lawyers.

The chief reason why it is so hard for the ordinary man to get the lawyer's picture of The Law – as a supreme mass of changeless abstract principles – is that the ordinary man generally thinks of law as a composite of all the little laws that his various governments are forever passing and amending and, occasionally, repealing. Congress and state legislatures and city councils keep laying down rules and changing rules. Is this not clear proof that The Law moves with the times? Briefly, it is not.

To the lawyer, there is a vast difference between The Law and the laws. The Law is something beyond and above every statute that ever has been or could be passed. As a matter of fact, every statute, before the lawyers allow it to mean anything – before they let it have any effect on the actions of men – has to be fitted into The Law by "interpretation" of what the statute "means." And any apparently harmless little statue is likely to mean plenty to a lawyer, just as a statute which seems to carry dynamite in its words may mean nothing by the time the lawyers are through with it.

A few decades ago when the famous Clayton Act was passed, which was intended to preserve competition and crack down on monopolies, a strong labor lobby got Congress to write Section 20 into the new law. Section 20 had practically nothing to do with competition or monopolies. Section 20 was intended to restrict federal

courts from granting so many injunctions against union activities. Samuel Gompers, who was then the head man of the unions, called Section 20 "labor's Magna Charts." But Samuel Gompers was no lawyer.

By the time the lawyers, headed by the Supreme Court, got through with Section 20 it meant exactly nothing. Chief Justice Taft, speaking for the lawyers, said it was *intended* to mean exactly nothing. Referring to The Law as authority, he said that it was clear that Section 20 was no more than a restatement of The Law as it had existed before the Clayton Act was passed. Now, Chief Justice Taft was in no position to know, and would have considered it irrelevant if he had known, that the Clayton Act might not have been passed at all if it had not seemed clear to labor that Section 20 gave strikers the right to picket without constant interference by the federal courts. But Chief Justice Taft and his court of lawyers had the last word. They made of labor's "Magna Charta" something strangely resembling Germany's "scrap of paper." And all in the name of The Law.

Of course, Chief Justice Taft and his court would have found it far more difficult to do this if other lawyers had not played a leading part in writing the Clayton Act. Section 20 was full of those typically meaningless words, like "willfully" and "maliciously." It said, for instance, that federal courts could not stop strikers from picketing "lawfully." "Lawfully," according to Chief Justice Taft, meant in accordance with The Law before Clayton Act was passed. Before the Clayton Act was passed, the lawyers had ruled that just about all picketing was against The Law. Therefore it still was. Q. E. D. And, incidentally, the Supreme Court did almost the same thing with the whole of the Clayton Act by picking on other meaningless legalistic words to prove that most trusts were not trusts and most monopolies were not monopolies – according to The Law. You can change the laws all you please, but you can't change The Law. And The Law is what counts.

It would, moreover, be a mistake to jump to the conclusion that Chief Justice Taft and his court "interpreted" Section 20 of the Clayton Act into complete oblivion merely because they didn't like unions or strikes or picketing. For Taft, in the course of explaining at great length why Section 20 did not really mean a thing, went out of his way to include in his opinion a rousing defense of labor unions. Of course, this defense did not do the unions any good after Taft got through with it. The point is that Taft was insisting to his fellow-lawyers – the only people who ever read or understand judicial opinions – that is disappointing the unions he was merely following The Law. The choice, however distasteful, was forced upon him. For it is part of the legal legend that no lawyer – not even when he becomes a Supreme Court justice – ever does any more than explain what The Law is and how it applies. He is merely the voice through which the great gospel is made known to men.

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Moreover, The Law can do strange things to man-made laws even when, as very rarely happens, such laws are not so full of "willfullys" and "maliciouslys" and "lawfullys" that they practically invite the lawyers to write their own ticket. For example, there was the Guffey Coal Act, involving federal regulation of the coal industry. The Supreme Court first said that most of the important parts of the Act were unconstitutional. Now, saying that a law is unconstitutional is really no more than a convenient way of saying that it goes against The Law. But the whole idea of constitutionality and unconstitutionality is so mixed up with notions like patriotism and politics, as well as with the most sacred and complicated of all legal rules, that it deserves and will get full treatment a little later on. The point here is that, after saying part of the Guffey Act was unconstitutional, the judges went on to say that the good part had to be thrown out with the bad part. Not unreasonable perhaps, on the fact of it. Not unreasonable until you learn that Congress, foreseeing what the Supreme Court might do with part of the Act, had taken particular pains to write very clearly into the Act that if part of it should be held unconstitutional, the rest of it should go into effect anyway. And so in order to throw out the whole Act, the Court had to reason this way: — Part of this law is unconstitutional. The rest is constitutional. Congress said the constitutional. Part should stand regardless of the rest. But that is not our idea of a proper way of doing things. We do not believe Congress would want to do things in a way that does not seem proper to us, who really know The Law. Therefore, we do not believe Congress meant what it said when it said to let the constitutional part stand. Therefore, we will throw it out along with the unconstitutional part. In the name of The Law.

That reasoning is not a burlesque. It is a shortened version of part of what the Supreme Court actually said, though the Court phrased it in multi-syllabic legal language, in the case of Carter against the Carter Coal Company. And the result is an example, more obvious but no more extreme than thousands upon thousands of others, of how little the laws written by our so-called lawmakers really mean until the lawyers have decided what those laws mean – or don't mean – in the light of The Law.

Thus, the common man is dead wrong when he thinks of law as a conglomeration of all the laws that are passed by legislatures and written down in books – even though it is true that practically all those little laws are phrased by lawyers in legal language. Those little laws, those statutes, are, to a lawyer, the least important and least respectable of three kinds of rules with which the lawyers deal. The other two kinds of rules are those that make up what lawyers call "the common law" and those that make up "constitutional law."

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Now, the common law is actually closer to The Law with a capital L than any constitution or statute ever written. The common law is the set of rules that lawyers use to settle any dispute or problem to which no constitution or statute applies. There is, for instance, no written rule to tell the lawyers (or anybody else) whether a Nevada divorce is good in Pennsylvania. There is no written rule to tell whether a man who orders a house built with a bathroom between the kitchen and the pantry has to take the house and pay the builder if everything else is fine but the bathroom is between the living room and the coat-closet. In both cases, the lawyer-judges write their own answers without interference from any constitution or statute. In both cases, the answers are said to be fished directly, non-stop, out of the mass of abstract principles that make up The Law.

Constitutional law is something else again. A constitution, in this country at least, is halfway between The Law and an ordinary statute. Like a statute, it is phrased by men, a few of whom are usually not lawyers, and is written down in definite if often nebulous-meaning words; (though in England the Constitution isn't written down anywhere and so is indistinguishable from The Law of England). But like The Law, constitutions, except where they deal with the pure mechanics of government – as in giving each state two senators or listing the length of a governor's term of office – are made up of abstract principles which mean nothing until brought down to earth by the lawyers. If this sounds like heresy, consider, for instance, the U.S. Constitution's well-known guarantee of freedom of speech. What does that guarantee mean, practically speaking? It did not stop the federal government from putting people in jail during the World War because they talked against war. It did not stop the police of Harlan County, Kentucky, from beating up people who tried to make speeches in favor of unions in Harlan County. On the other hand, that constitutional guarantee does prevent the extreme restrictions of free speech which are common abroad today. How tell, then, which free speech is good and which is bad, under the Constitution? Only by asking the lawyer-judges. And how can they tell; how do they decide? Simply by referring to our old friend, The Law, in order to "interpret" the Constitution.

The Law is thus superior to constitutions, just as it is superior to statutes. And according to the legal legend, it is neither constitutions nor statutes which finally determine the rules under which men live. It is The Law, working unimpeded to produce the common law, working through the words of constitutions to produce constitutional law, working through the words of both statutes and constitutions to produce statutory law. All three kinds of law are merely obedient offspring of that great body of abstract principles which never changes and which nobody but a lawyer even pretends to understand.

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Justice Holmes was in effect talking about The Law as a whole, when he said of its nearest and dearest offspring; “The common law is not a brooding omnipresence in the sky.” But Justice Holmes, as he well knew when he said that, was dissenting not only from a decision of the Supreme Court but from the opinions of most lawyers about The Law. For practically every lawyer thinks and talks of The Law as a sort of omnipotent, omniscient presence hovering around like God over the affairs of men. Yet every lawyer purports to be able to understand and interpret a large part of that presence for the benefit of those who are not lawyers – at a price.

The strange thing is, however, that lawyers, for all their alleged insight into the great mystery, are never able to agree about the presence or its interpretation, when it comes down to applying The Law to a simple, specific factual problem. If the lawyers agreed, we would not have appellate courts reversing the judgments of trial courts and super-appellate courts reversing the judgments of appellate courts, and super-super-appellate courts – or supreme courts – reversing the judgments of super-appellate courts. The fact is that every lawyer claims to know all about The Law to a specific dispute. Whereas no non-lawyer cares in the slightest degree what The Law is until it comes down to applying The Law to a specific dispute.

It is all very well for a lawyer to say, out of his knowledge of The Law, that a “mortgagor” has “legal title” to a building. That is very pretty and sounds very impressive. But if the mortgagor then wants to know if he can sell the building, and on what terms, and if he has to pay taxes on it, and if he can kick the mortgagee out if the mortgagee comes snooping around, the lawyers will begin to disagree. It is all very well, too, for a lawyer to say that The Law forbids “interference with the freedom of contract.” But when 57 respectable lawyers of the late Liberty League declare unanimously that employers need pay no attention to the Wagner Labor Act, because it interferes with freedom of contract, and then the Supreme Court tells them they are 100% wrong, the 57 lawyers undoubted knowledge of The Law begins to look just a trifle futile.

The Law, as a matter of fact, is all things to all lawyers. It is all things to all lawyers simply because the principles on which it is built are so vague and abstract and irrelevant that it is possible to find in those principles both a justification and a prohibition of every human action or activity under the sun.

And how does The Law, then, ever get brought down to earthly affairs? In what way does it actually succeed in building regulatory fences around men’s conduct? The answer is just as simple as it is complex. The answer is that the last bunch of judges which gets a shot at the solution of any specific problem has the decisive word on The Law as it affects that problem. The solution which that last bunch of judges gives to that problem *is* The Law so far as that problem is concerned – even

though every other lawyer in the world might suppose The Law was different. It might not then be irrelevant to ask just what a judge is. And it was an unusually candid judge who recently gave the best answer to that question. “A judge,” he said, “is a lawyer who knew a governor.”

The lawyers who knew governors – or who knew presidents – or who knew enough ward-leaders (where judges are elected) – bring The Law down to earth in all sorts of different and conflicting ways. A home-owner who beats up a trespassing hobo may be a hero in one state and a criminal in another. But no matter which he is, the legal appraisal of his actions will fit perfectly into the great and ubiquitous framework of The Law. For, no matter how differently different judges in different places may decide the same human problem, or decide it differently in the same place at different times, the great legend of The Law as steadfast and all-embracing is always adhered to. Decisions may change or differ or conflict but The Law budges not.

And it is necessary to understand this keystone of legal reasoning – and to accept it as a fact no matter how silly it may sound – before it is possible to understand the strange processes of The Law. It is necessary to realize that The Law not only stands still but is proud and determined to stand still. If a British barrister of 200 years ago were suddenly to come alive in an American court-room, he would feel intellectually at home. The clothes would astonish him, the electric lights would astonish him, the architecture would astonish him. But as soon as the lawyers started talking legal talk, he would know that he was among friends. And given a couple of days with the law books, he could take the place of any lawyer present – or of the judge – and perform the whole legal mumbo-jumbo as well as the. Imagine, by contract, a British surgeon of 200 years ago plopped into a modern hospital operating room. He would literally understand less of what was going on than would any passer-by brought in from the street at random.

The law, alone of all the sciences, just sits – aloof and practically motionless. Constitutions do not affect it and statutes do not change it. Lawyers talk wise about it and judges purport to “apply” it when they lay down rules for men to follow, but actually The Law – with a capital L – has no real relation to the affairs of men. It is permanent and changeless – which means that it is not of this earth. It is a mass of vague abstract principles – which means that it is a lot of words. It is a brooding omnipresence in the sky – which means that it is a big balloon, which has thus far escaped the lethal pin.

CHAPTER III

THE WAY IT WORKS

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"*…the lawless science of our law,*
That codeless myriad of precedent
That wilderness of single instances." — Alfred, Lord Tennyson

In order to demonstrate up to the hilt that the whole of The Law is a hoax, a balloon, a lot of empty words, it would presumably be necessary to take each principle and sub-principle and counter-principle of The Law in turn and divest each one of its dazzling legal trappings so that the non-lawyer could see that there was nothing inside any of them. Plainly, that would be impossible. The lawyer-judges alone turn out each year hundreds upon hundreds of books full of nothing but refinements of The Law and its principles. Tremendous libraries overflow with volumes which are not even about The Law but which *are* part of The Law. (Lawyers, incidentally, spend most of their working lives trying to make a small dent in the mountains of literature that help make up The Law.) Yet it may perhaps serve the general deflating, or disrobing, purpose to take the legal pants, step by easy step, off a few simple and entirely typical examples of The Law in action.

The field of Law known as Contracts is one of the most settled, most venerable, and least politically complicated fields of Law. It is the field of Law that deals with the agreements, business or otherwise, that men – or companies (but companies, remember, are nothing but men to The Law) – make with each other. Those agreements usually consist of one man promising to do one thing, such as to dig a ditch, and another man promising to do another thing, such as to hand over $50. Of course, if men could be trusted to keep their promises there would be no excuse for a Law of Contracts – but then if men could be trusted to act decently in general there would be little need for Law of any kind. As a matter of fact, only gamblers trust each other to keep their promises, for The Law will not stoop to enforce a gambling agreement or bet. The whole Law of Contracts is based on the idea that men in general cannot be trusted to keep their promises, and around this area of mutual mistrust The Law lays down its principles.

The first principle is that before you can have a Contract that The Law will uphold, you must have an Offer by one party and an Acceptance by another party. (Only The Law insists on making a "party" out of a single person.) What then, in the first place, is a legal Offer? It is something quite different from an ordinary non-legal offer, in the sense that the man in the street might use that word. A lawyer would scoff at the notion that most offers were Offers.

For instance, if a man says to his gardener, "Tony, I'll give you fifty dollars," that is not a legal Offer. If a man says to his gardener, "Tony, I'll give you fifty dollars if you'll dig a ditch for me," that is not an Offer either. But if the man says to his gardener, "Tony, if you'll dig a ditch for me, two feet deep and three feet wide,

running from the northwest corner of the house to the pigpen, and finish it by Wednesday week (though The Law would frown on such colloquial phrasing), I'll pay you fifty dollars when you get it done," that *is* an Offer. And incidentally, if Tony says "O.K., Boss," that's a full-fledged Acceptance.

What is it that makes the third proposition a legal Offer, whereas the first two were not? Briefly, it is the fact that it is definite enough so that when Tony says, "O.K., Boss," the boss knows and Tony knows and, most important, any judge would know exactly what Tony was expected to do. Of course, the whole question of whether something is an Offer or isn't an Offer is based on the assumption that Tony and his boss may some day end up in court over their conversation. And on that basis, it seems fair enough to say that if Tony promised to do something definite, he made a Contract (which means only that a court will hold him to his promise or soak him for breaking it) and if he did not promise to do something definite, he did not make a Contract. But the phony part is the way The Law brings into the picture one of its irrelevant generalities – here, the abstract idea of a legal Offer – in talking about and dealing with a simple business arrangement.

If Tony and his boss should ever get into court over the undug ditch, The Law of the case would be solemnly stated like this: — The proposition was definite; *therefore* it was a valid Offer; *therefore* once it was accepted, there was a valid Contract; *therefore* Tony must dig or pay. Or else: — The proposition was too indefinite; *therefore* there was no valid Offer; *therefore* there was no Contract; *therefore* Tony need do nothing. The point is that the question of there being or not being an Offer is utter nonsense. The whole business could be reduced very simply to – the proposition was definite, therefore Tony must dig or pay; or, the proposition was indefinite, therefore Tony need do nothing. But of course, to simplify legal reasoning even to this small extent would make the case immediately much more comprehensible to the non-lawyer, and would leave the lawyers with no special and mystifying lingo in which to discuss a simple little problem. Moreover, it would leave The Law out of the picture. The Law, remember, is that before you have a Contract, you have to have not an offer, not even a definite offer, but a legal Offer.

To get back to the ditch, suppose Tony, instead of saying, "O.K., Boss," had said, "I dig him for sixty bucks, Boss," and the boss had then said, "O.K., Tony." The average man would say that they had come to terms and if The Law enforces that kind of thing, that'' fine. The Law would enforce it, all right, but not in those words. To The Law, Tony'' comment would first have to be a Counter-Offer, involving an Implied Rejection of the Original Offer, and the boss's "O.K." would then become an Acceptance of the Counter-Offer. And if, by any chance, the boss had come back at Tony with "How about fifty-five?," *that* would have been a

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Counter-Counter-Offer involving an Implied, etc. It takes three years to get through law school.

The Acceptance of an Offer is not always so simple as an "O.K., Boss," or an "O.K., Tony," either. For instance, the boss might have described the ditch he wanted and how much he would pay for it, and Tony might have said nothing, and then the boss might have set out for the 8:20 train leaving his Offer, as it were, hanging in mid-air. Three days later he comes back and finds the ditch all dug. Does he have to pay the fifty dollars he Offered for it? Any moron would say, of course he does. But why, according to The Law? Apparently there was no Acceptance, and you can't have a valid Contract without an Acceptance, and may be by this time the boss has decided he doesn't want the ditch anyway, or that fifty dollars is too much to pay for it.

The Law slides out of this one neatly and easily. The digging of the ditch, says The Law, amounts to an Acceptance. Now the digging of the ditch amounted to Performance too – another, and more or less obvious, legal concept – but that does not stop it from being an Acceptance at the same time. And if The Law could not find an Acceptance somewhere, there would be no valid Contract and Tony might never get his fifty dollars. Which would be obviously silly. Just about as silly as looking all around for an acceptable Acceptance before you see to it that he does get paid.

Suppose, though, that when the boss gets home Tony has dug not the whole ditch but half of it. And the boss then says, "I don't want the ditch and I won't pay for it so don't finish it," and Tony says, "But Boss, you promised," and proceeds to finish the ditch and sue for his fifty dollars. The court will then settle down to deciding, under The Law, not whether it was fair for the boss to take back his promise after the ditch was half dug, but whether digging *half* the ditch did or did not amount to an Acceptance of the Offer. For before Tony gets paid the court must find a valid Contract and before it finds a valid Contract it must find an Acceptance.

Probably Tony would get his fifty dollars if he had dug half the ditch by the time his boss backed down. But if Tony had only shoveled a few spadefuls of earth by the time his boss got home and said the ditch wasn't wanted, those few spadefuls would never amount to enough Acceptance to satisfy a court. Thus it becomes apparent that somewhere along the ditch's projected course, somewhere between the start and the finish of the job, The Law, stooping to earth, first finds a magic line. Then, if the boss catches Tony one inch on one side of the line, The Law will intone – no Acceptance, no Contract, no fifty dollars; whereas if Tony is one inch on the other side of the line, The Law will intone – Acceptance, Contract, pay up.

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But neither The Law nor any lawyer can ever tell you in advance where that magic line is. A lawyer can only tell you what The Law is. The Law, you may remember, is that you have to have an Acceptance of an Offer before you have a Contract.

Another great abstract concept in the Law of Contracts is something called Consideration. There has to be Consideration, as well as Offer and Acceptance and a number of other solemn-spoken legalisms, before a Contract is good in the eyes of The Law. Putting it very roughly; Consideration generally means that a contract has to be two-sided;; each "party" to it has to have something given him or promised him or done for him in return for what he gives or promises or does. In *l'affaire* Tony-and-boss, the Consideration for Tony's promise to dig a ditch was his boss's promise to pay Tony fifty dollars, and the Consideration for the boss's promise was, in turn, Tony's promise – or, if Tony didn't promise, the actual digging of the ditch became the Consideration. (Thus, a common-or-garden digging of a ditch can be dignified by The Law into an Acceptance, a Consideration, and a Performance, all at the same time.)

Theoretically, the purpose of insisting on Consideration is to see to it that a Contract is a fair bargain. Actually however, The Law time after time finds Consideration in an extremely unfair bargain – and fails to find Consideration where the proposition looks relatively fair. If a man says to a panhandler, "I like your face, so tomorrow I'm going to give you a dollar," there is no Consideration for the promise, and so there is no Contract, since The Law does not take such aesthetic values into account. But if a man says to a panhandler, "If you'll give me that cigarette in your hand, I'll give you a hundred dollars tomorrow," and the bum hands over the cigarette, then there *is* Consideration for the promise, and there may well be a valid Contract, and if there were enough witnesses to the transaction who will swear to it in court, the panhandler may even get his hundred dollars.

For the Law of Contracts rarely pays attention to surrounding circumstances. So far as The Law is concerned, a man offered to pay a hundred dollars for a cigarette and got the cigarette. For all The Law knows, the two men may have been lost in the middle of a desert and the cigarette their last smoke, or the cigarette may have belonged to Franklin Roosevelt or may have been autographed by Babe Ruth. At any rate, someone offered a hundred dollars for it and got it. And a cigarette – or a match, for that matter – can be pretty good Consideration, even for a promise to pay a hundred dollars.

Now, a good half of the voluminous Law of Contracts is concerned with what is good Consideration and what is not good Consideration. As a matter of fact, once Offers and Acceptances and a few other little things are out of the way, the whole question of whether a court will or will not uphold a promise comes down to a