# A REASONABLE DOUBT

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By the Same Author

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HOWL OF THE CENSOR

EHRLICH'S CRIMINAL LAW

CRIMINAL EVIDENCE

THE EDUCATED LAWYER

WHAT IS WRONG WITH THE JURY SYSTEM

THE LOST ART OF CROSS-EXAMINATION

TRIAL OF THE CONTESTED DIVORCE CASE

THE HOLY BIBLE AND THE LAW

# A Reasonable Doubt

BY J. W. EHRLICH

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# FOREWORD

IN THIS, his latest contribution in the field of legal history and bibliography, J. W. Ehrlich, the distinguished author of such masterpieces as *The Holy Bible and the Law* and *Ehrlich's Blackstone*, has successfully presented the reader with perhaps the most fascinating form of literature: the legal essay that becomes as much a statement of personal philosophy as it is a statement of law.

The contents of this book are not, as might be imagined, exclusively limited to learned discussions of the law. There are no dry and musty dissertations within these pages, nor will the pedant find points to quibble about. Instead, what the reader—whether he be an attorney or a layman—will find here is a collection of lively and humorous anecdotes in addition to many simplified discussions of some of the finer points of the law. For example, the reader will discover a gentleman in Los Angeles who unsuccessfully petitioned the court to change his name to that of a famous film star. The humanist and the criminologist will read much of interest in Mr. Ehrlich's controversial positions on such timely subjects as capital punishment and why, as he believes, the lie detector ought to be relegated to the scrap heap. The American historian, further on, will no doubt be surprised to learn of Aaron Burr's finance trick played upon Alexander Hamilton and the fact that the consequences of this piece of legal legerdemain far outlived its author, still having consequences long, long after Burr's death. One of the essays in this book deals with a killing and the judge's instructions to the jury just before they retire to decide on the defendant's guilt.

These are just a few of the many absorbing and thoroughly readable subjects that the author covers. And there are more . . .

In addition to his reportage of incidents and anecdotes of interest to all readers, Mr. Ehrlich has successfully written a philosophy of human relations that is peculiarly American. To qualify this statement, let me add that I believe Mr. Ehrlich has captured the state of mind that was the political morality—as they lived it and as they wrote it—of our founding fathers. And most important, the author appreciates that our founding fathers —Jefferson, Madison, Franklin, Paine, and the many others— were but reflections of the body politic that surrounded them, the electorate, the American people. For our laws were not written, were not conceived, by the founding fathers, alone. Our laws were, in essence, the fingerprints of the American people impressed upon the pages of history.

Mr. Ehrlich understands, as did the American people during the time of our Revolution, that there had been democracies in existence over two thousand years before ours and that these democracies were tragically short-lived, soon falling into the hands of despots and demagogues. Our founding fathers had read their histories well and during their lives they, too, feared the awful and often-inferred presence of the unenlightened majority, always in a position to trample upon the rights of the minority. The author is disturbed by this and often, within the pages of this work, as he raises his voice in an angry and outraged cry for the rights of the minority, one may correctly infer that his voice contains as much anger directed toward the *principle* of such an act on the part of the majority as it contains anger toward the *act* itself.

There are many, many things that Mr. Ehrlich says within *A Reasonable Doubt*. I shall simply touch upon a subject that is very close to me, his recognition that our constitutional framework and our Bill of Rights are—and always have been—the pattern of individual liberty under law: government, it should be said, that must be the direct expression of an enlightened



electorate. Mr. Ehrlich bases many of his premises upon our Declaration of Independence, which avers that certain of our rights are inalienable because they come to us from a higher power than the state or, as our founding fathers put it, "endowed [upon us] by our Creator," that therefore these rights of the minority, these rights of the individual citizen, cannot be taken away from *any of us*, either by a mob on the street, a policeman, or by *any* act of *any legislature!*

As one peruses this remarkable book it will be found that Mr. Ehrlich has woven a consistent thread throughout his tapestry of personal declaration, a consistent demand that more than just lip service to the inalienable rights of the individual be given, lest lip service in lieu of protection and recognition lead to regimentation of the people and the ultimate magnification of the state, which would bring all of us into the coldest and darkest nights of tyranny, where we would be eternally governed by a cold and impersonal monolith that would forever compel each individual to sacrifice a portion—an ever-increasing portion— of his liberty "in the interest of the common good."

In those sections of the book where Mr. Ehrlich squarely attacks what he believes to be wrong with many of the present misguided interpretations of what our heritage of individual liberty actually comprises, it is almost as if he is re-echoing the warning of the late Justice Sutherland of the United States Supreme Court when he said: "The saddest epitaph ever carved to the memory of a vanished liberty is that its possessors failed to lift their hands to keep it while they yet had the power."

If the reader of this controversial book does not always agree with the author, the reader will nevertheless have exercised his intellect and in this very act he will have perhaps strengthened it, as an athlete strengthens his muscles by another form of exercise. The younger reader who concerns himself with the chapters that the author partially or totally devotes to a re-examination of the fundamental principles that govern our way of life will quickly detect that a cleavage exists between what he,

the reader, may have been taught in school and what, perhaps, the people of an earlier and younger America actually had in mind concerning the meaning of that much-used but poorly understood word "democracy."

In conclusion, it may be said that this book is most properly the author's own, personal interpretation of that most elusive mystique "the American Dream." As long as Mr. Ehrlich and his contemporaries continue to search for it, redefine it, and cherish it each time they find it, the dynamics of the American Revolution and their continuing impact upon our society will not be lost and the liberty and the dignity of each individual will be assured.

THOMAS P. WHITE
*Retired Associate Justice of the Supreme Court of the State of California*

*November 15, 1963*

Magna est veritas—truth is great. Debunking the accepted liturgy of popular belief is not an easy approach to truth but *A Reasonable Doubt* will in some degree lighten the burden of disbelief.

It is against tremendous odds that man battles to destroy false gods once an idol has been built. Perhaps in the following pages you will agree that some accepted truths are sorely damaged by factual data to the exclusion of fable.

Magna est veritas.

J. W. EHRLICH

*San Francisco, 1963*

# In Search of the Truth

# IN SEARCH OF THE TRUTH

MEN ARE LIKE FINGERPRINTS; no two are alike. While many men have no choice as to the occupations they will follow for the balance of their lives, some of us are able to choose our calling, as the mariner of old chose a star in the dark of the ocean's night, following it until the dawn broke, and with it, light. I belong to this latter classification; fortune has been good to me. I was given a star to follow.

Some men are like bankers; they love money. Others like to be engineers or builders; they want to see a tangible monument to their lives. And then there are others who feel they owe mankind something. All of us represent a fraction of each of the above; the best of us try to remember that our debts to mankind are never fully discharged.

In spite of the fifty-five million laws ruling our every move, I truly love my calling—my star—the Law. It is a ruthless taskmaster, the Law, for within this arena where conduct is governed by these fifty-five million laws, human rights can be quickly forgotten and man fast relegated to the Kafka-esque role of the tiny cog within a wheel, within another wheel. The Law tries, sometimes impersonally, to make us do what it tells us to do. In the cold, bleak, barren sentences that run together and blend into legal jargon—words found in our lawbooks—there is little or no understanding, compassion, or love for the abstract man. As a nation, and considering the heritage of freedom and civil obedience that good men fought to hand us, untouched, we are the greatest police state in the world.

And I say that if we are a police state as a result of the Law, the Law is still my calling; it is a first love, for the Law, per se, is no better and no worse than a loaded pistol. Guns do not kill people; people kill people. In concept the Law should be as plastic, as putty in the hands of a sculptor who first makes a mold before he begins to slash at granite. I love the Law because it could, with an enlightened public, become the grandest instrument of their will; it could become the living embodiment of all the fine emotions that, like cruel emotions, are the heritage of man. Carpenters have their tools; writers have their tools; both work with their tools as they see fit. It is thus with the lawyer; his tools are books and words, and he does the best he can to stand between man and the laws man thinks he ought to have. A lawyer is a kind of legal gunsmith; without him you cannot fire true on target. Without him, you may be handling a weapon with a cracked breech, a weapon that could, when fired, blow up in your face.

As a lawyer I feel a deep obligation to my client and his cause. Whatever his alleged sins, whatever my client's background, regardless of his creed, he is my client. He has retained me because he is alone and frightened in a land of badges or torts, bars or bankruptcy. Regardless of what my client has done, the Law and a sense of moral obligation charge me to do my very best for my client. And while I do not justify harming in any way another human being, I have seen enough murder to understand why it is that one man kills another. And so would you, I think, had you listened to, talked with, and hand-held as many murderers as have I. Each murderer—like each man—is a kind of spiritual fingerprint, apart from and unlike any other being; you will not know him until you understand his feelings, his hurts, his loves, his every waking thought.

When I walk into court, when I take meals with my friends, when I speak at gatherings, and say, "Never plead guilty," I am doing nothing more than acknowledging that it is a human being I am defending, not a robotnik. I am telling the State: "Take



your best shot, if you will; we will give you nothing. You must prove all." I am operating, in criminal actions, always with the conviction that our police state—and it surely *is* a police state we are headed for, if not living in—prove its charges. I take no policeman's word, no prosecutor's protestations, to mean a thing, if my client has come to me and has told me: "My hands are clean."

A trial is a fascinating thing. Each time I walk into court I see, in the spectator's sections, old, familiar faces; people who spend each day going from one courtroom to the other, listening to arguments, direct examinations, and the like. It is an instructive way to spend a day, even if you are a layman, for there is much to be learned in a court of law.

The defendant, in a criminal action is, all too often, in a position that some call: "Up for grabs." The State and its functionaries have claimed the defendant is guilty of some offense, hence the trial in the first place! And while the prosecution must prove the charge of a criminal act to a moral certainty, and beyond a reasonable doubt, the Duncan Do-Right who reads the newspaper smacks his lips and gloats each time the State shoves another wretch into a criminal court. "Got to be guilty," says Duncan. "Wouldn't be there in the first place if they didn't have the right man!"

Thank God that Duncan Do-Right has never done a wrong thing, never made a mistake, never told a lie. By the way, if you would like to meet a Duncan Do-Right, spend some time in your local municipal court; Duncan will be the complainant, alleging that another party sold him a gold brick or, possibly, the Brooklyn Bridge.

Many factors enter into a trial. Trying a case, standing on your feet and searching your brain for quick answers, is a heady wine for the best man; he who is a slow lawyer may have a dead client. Also, there are many more factors to be encountered in a court of law than one would imagine, has he not spent much time in trial; this includes many lawyers who have never actually

tried a case, limiting their life's work to scholarly research, legal writing, or other extra-courtroom occupations.

The business of witnesses against the defendant is something too many people place too much faith in. Here, I am not necessarily saying that witnesses lie; most of them do not. But they are suggestible and, like little children, sometimes have the tendency to say anything that the prosecutor puts in their minds. For that matter, not even lawyers make good witnesses in court; experience with people in matters under litigation has made them much more aware than other persons that man's perceptive powers are, at best, somewhat unreliable. Having found, by cross-examination of witnesses, how no two persons perceive the same event with the same set of eyes, the lawyer is often the first to admit his own perceptions could be in error.

Many factors we have only recently discovered tend to unduly influence a witness. The studies made by psychologists have taught us that feelings, suggestions, emotions, empathy, association—all tend to influence the witness's capacity for accurate, objective perception. And because we really have few tests, at the early stage of a trial, to determine a witness's reliability, an innocent man may be sent to the penitentiary by an honest but thoroughly biased witness.

The history of the courts' placing the witness's credibility under scrutiny goes as far back as the fourteenth century, and surely further, should we care to look. But during the 1300s, judges maintained that the indispensable requisite to form an opinion on the trustworthiness of a witness was that he, the witness, appear personally before the judge. The court could then gain certain impressions as to the witness's manner of answering questions, his reactions, behavior, and physical appearance. Following the examination, the judge would then put into the record his reactions to the witness; that the witness stammered or hesitated in replying to specific questions, or showed fear during the examination, as well as any other circumstances about the witness that the judge felt impelled to record.



The natural and acquired shrewdness and experience by which an observant judge forms an opinion as to whether a witness is lying or telling the truth are by far the most important of all the trial judge's qualifications; no doubt, infinitely more important than any acquaintance with the Law. Insofar as the judge's abilities to perceive truth, falsehood, or simply addled confusion in a witness are concerned, I assure you that no school of law, no set of books, will so qualify him. Such knowledge can only be learned by experience, and here the judge may be handicapped, as he has probably had little of it in this most subtle art of all: detection and preservation of the truth when dealing with a witness. People come before him with their cases prepared and give evidence which they have determined they shall give. Like untidy housekeepers, many persons come before the judge with clean floors; all the dirt is hidden away, under the rug. It is for the judge to do a little rug lifting, if he is to find the truth.

As I have said earlier, the observations of witnesses are either generalities too vague to be of much practical use, or they are so narrow and special that they can be learned only by personal observations and practical experience. The most acute observer would never be able to catalogue the myriad tones of voice, the passing shades of expression, or the unconscious gestures which he has, by tradition, learned to associate with falsehood. And this is the plight of the trial lawyer in court, standing before a judge with limited experience in matters of ascertaining the truthfulness of a witness. By and large, the English and American traditional procedures of examination are doubtless entitled to high praise, but on the whole it is the rarest and highest personal accomplishment of a judge to make allowance for the ignorance and timidity of witnesses and to be able to see clearly through the confident and plausible liar.

Without a doubt, the result of our courtroom procedure is to vest the trial judge with immense power not always subject to correction later on, when the case may be appealed. The judge's estimate of a witness's oral testimony as regards credibility may

frequently stem from an absurd rule of thumb: the assumption that when a witness wipes his hands profusely during his testimony he is lying. But unless the judge somehow reveals, in his record of the trial, that he has used such an irrational and high-handed method of determining witness credibility, the higher courts can do nothing to correct his error; they will have to assume that the trial judge used some infallible system not governed by human vagaries.

To understand better why trial lawyers—who love the Law but are still driven to despair by some of its facets—sometimes have a sour disposition, let us see what actually happens when oral testimony is being heard by a judge and jury.

When an honest witness testifies to something he saw, what does he do? He represents, under oath, that he accurately saw or heard something of importance to the case—some past event or thing—that now, in the courtroom, he accurately remembers to the most finite detail. Our witness would like us to believe he is a combination movie camera and tape recorder. Well, insofar as his initial observation of the event, his memory of the observation of that event (for now, some time has passed between the event and the trial), and his verbal communication in the courtroom . . . error can enter, and often does.

When a witness says: "I saw," or "I heard," what he really means is: "I believe I saw," or "It is my opinion I heard." His testimony consists of nothing but a report of his beliefs, and this report is not a documented series of facts, just a series of now-moldy recollections that have been colored by the passage of time as well as the talks he may have had with the district attorney or the police.

I think William James best expressed the state of mind of the average witness when he said: "Whilst part of what we perceive comes from the object before us, another part (and it may be the larger part) always comes out of our mind. . . ."

Now, judges and jurors also fulfill the function of a witness—a witness as to what goes on during the trial. They must decide the facts of the case from what they see and hear; that is, from the words as well as the demeanor of the testifying witnesses. Reduced to absolutes, the judge and the jury are witnesses of the witnesses and, if those who testify are not to be likened to scientific observers, neither are the judges nor the jurors: they make the same mistakes the testifying witnesses make.



If a judge or a juror has a hearing defect, he is bound to miss some important point, or misunderstand defense testimony about defense's alibi. The communication process between a key witness and a partially deaf (or dozing) judge or juror may be likened to a conversation that takes place between a Swahili and a Swede; little, if anything, will get through. Similarly, defective eyesight may interfere with the juror's observation of an important witness's demeanor; say, the spectacle of the State's witness testifying against the defendant, with a smirk on his face.

Deficient memory of the testimony that has taken place in the courtroom will surely lead to error later on, in the jury room. And don't think that because twelve jurors have heard the same testimony the majority will necessarily have understood it. Usually, it will be the mistaken juror whose bray will eventually bring the others around. Every practicing lawyer is familiar with the daily recurring spectacle of lawyers and judges disagreeing as to what testimony has been given by a witness just a short time before! Thus, even men with trained minds in such matters, whose attention is constantly riveted upon the witness, who realize the importance of every word, may receive erroneous or inconsistent impressions of a witness's narrative. And if these trained and skilled practitioners of the Law make such mistakes, what say you of the mistakes a juror could make?

That the truth will out, alas, is not invariably true. It is often untrue because our jurors have no adequate guides for determining which witness speaks the truth and which speaks

with a forked tongue. Cross-examination, as a pure wind that blows away the smog of lies, prejudices, and mistakes, has been greatly overrated. To evaluate the reliability of a witness's testimony would in most instances require a knowledge of his personality that the jury could not possibly acquire from seeing and hearing him just a brief time in court.

The best cure for our legal inequities, of course, would simply be if more people were aware of the frailties and unreliabilities of our so-called powers of perception. Knowing how unreliable the best of us can be when it comes to memory, we should all be far less positive about things and, by the same token, more tolerant of the other's honest mistakes. For no man who is honest with himself can ever stand pat on the accuracy of his own testimony. He not only may be mistaken, but most often is.

The problem of truth, the search for the accurate, truthful witness, is, has been, and will be going on for a long, long, time. It is not just my search; it is yours too. It is a fascinating search, for it may lead you into the strangest lands, onto the most distant shores of human experience. And because the truth, like the search for the truth, is purely a human experience, it must have within it all of man's faults and virtues. For the truth is man, and both are the Law; among the three we have civilization, and without them we should have nothing but the darkest of nights, the coldest of worlds.

## YOUR WITNESS!

IF GIOVANNI JACOPO CASANOVA DE SEINGALT had been as adept in the art of cross-examination as he was skillful in the science of seduction, he would today be regarded as history's greatest lawyer as well as its greatest lover.



Surprisingly, the ways to winning over a witness and wooing a woman are similar. In each case the conquest must be carefully planned and executed. In the waging of such wars the lawyer and the lover fight a common enemy: hostile suspicion.

Similar, too, are the dangers to be avoided. The greatest of these is proceeding too far too fast.

Many a lawyer is of the theory that cross-examination should never be undertaken. I am not of that school, although I know full well that it can prove to be fatal as well as fruitful. In the hands of the expert trial lawyer, cross-examination is a broadsword to victory. In the hands of the inexperienced, it can be a boomerang.

Unfortunately for the lawyer, when he takes a case to court he must also take a client with it. In many an instance it is the client who demands that his attorney take on a witness and question him as to statements made on the stand.

And there's where the danger lies. In questions? No. Not in questions, but in the one question too many.

In a California courtroom not so many years ago a personal injury suit was in trial. The plaintiff contended he had been physically and financially injured as a result of an accident. He said so on the stand in a tone of voice calculated to arouse the sympathy of the jury.

The defendant, an insurance company, was represented by an eager young practitioner who could hardly contain himself until the moment when he was able to begin questioning the plaintiff. The cross-examination went thusly:

> Q. Did you, at the time of the accident, when you were asked if you were hurt, reply that you weren't hurt?
>
> A. Yes, sir, I did.
>
> [The questioning should have gone no further. The plaintiff had been led to admitting that at the time of the accident he had said he had not been hurt. But our hero was not satisfied and continued.]
>
> Q. Well, sir, why have you been testifying all morning that

you were hurt, giving the jury the impression that you were still suffering from the effects of the accident?

[The why question was, is, and always will be sudden death for some lawyers. Read on.]

A. Well, Mr. Smart Lawyer, it was like this. I was driving my horse-and-buggy along the road, and along comes this client of yours in his automobile and knocks us in the ditch. You never saw such a mess in all your life. I was flat on my back with my legs in the air. My poor old horse was on his back with his legs in the air. The buggy was completely wrecked. Now this client of yours gets out of his car and looks at us. He sees my horse has a broken leg. He goes back to his automobile, gets a gun, and shoots him. Then he comes up to me and says, Now what about you? Are you hurt?

I do not need to relate the verdict of the case, nor tell you that the lawyer never made the same mistake again during a long and profitable private practice that began immediately after the insurance company learned of the incident in the courtroom.

An even more dangerous undertaking is the cross-examination of what the law terms an expert witness, a person so qualified that his testimony is considered to be beyond question.

An example of the folly of tackling the testimony of an expert witness occurred in a drunk driving case. The arrest had been made by a police officer whose employment record showed the defense attorney that he had only been on the force a short time. The cross-examination began:

Q. Patrolman Murphy, do you think that a year's experience as a police officer qualifies you to state that my client was intoxicated?

A. No, sir.

[Again, the questioning should have stopped, but it didn't.]

Q. Upon what, then, do you base your assumption that my client was drunk?

A. Fourteen years of bartending.

While cross-examination can be the curse of a lawyer's life,



so can the interrogation of your own client bring disaster, the pitfall being the same—asking that one question too many.

In a dispute between a landlord and a tenant a lawyer made just such a mistake. The landlord wanted his tenant, an attractive young widow with a child, evicted on the grounds that her conduct was questionable. He complained that she made too much noise and had too many visitors at all hours of the day and night.

In this instance, cross-examination proved to be beneficial. Our lawyer got the landlord to admit grudgingly that he had made similar accusations against previous tenants that had been proven unfounded.

The mood of the jurors indicated to courtroom observers that the case would be decided in favor of the attractive widow. There was no need to put her on the stand, but, of course, our hero did just that:

Q. What is your name?

A. Mary Jones.

Q. What did you say to Mr. Flowers in connection with renting the apartment?

A. I told him I was a widow who needed a home for me and my little boy.

Q. What is your son's name?

A. James Smith.

Q. Oh, is he your son by another husband?

A. No, by a friend.

It is easy to see that Pandora's box can be opened with a question as well as a key.

## UNDUE INFLUENCE

THERE ARE A NUMBER OF WAYS in which he who is searching for a black eye or a bloody nose may be accommodated. A political discussion on the relative merits of a Republican candidate, held at high noon deep in San Francisco's Mission District, is almost guaranteed to lead to a severe degree of physical disfigurement. A case of roving hands on a crowded bus, the taking of another's parking place, and cutting in at the head of the box office line on the night a highly touted musical opens are also guaranteed to do the trick.

And if all else has failed to produce the desired result, you can always precipitate an argument, at least, about the female and her influence over the male.

It is an undisputed fact that the female sex does have the power, in many instances, to exercise a dominating influence over the male of the species. The peacock fans out the iridescent glory of his plumage all the more brilliantly when the peahen stands beneath the near-by mulberry bush. That, my friends, is female influence.

A tired workman, home from the shop after a hard day's work, tries to get in an hour or two of sleep. He weighs two hundred and twenty pounds. His wife, on the other hand, weighs one hundred soaking wet. She wants him to put the curtains up. The curtains go up after a certain amount of hinting relative to dinner, the budget, and the chances of getting a new car. That, too, is female influence.

Every schoolboy knows of Edward VIII giving up his throne for "the woman I love." If that is not female influence, I defy you to show me what is! And, finally, we read of King David





deliberately sending a man to his death in the front lines of battle as a shapely woman, who bathed across the way, darkens the doorway of the palace. This is surely female influence.

In the Law, there are two degrees of influence—due and undue influence—and, further, there is a distinction between reasonable and unreasonable influence. Finally, there are further distinctions between opportunity and exercise of influence.

Since all this has been purely an academic discussion and intended solely for entertainment, don't put it to the test; you may be influenced.

## EYEWITNESS

SOMETIME THIS YEAR the following scene, with modifications, will be played out in one of our universities.

Some twenty students sit in a classroom, their heads bent over examination papers. Suddenly the door pops open and a young woman, about five feet tall and dressed in levis, a plaid hunting shirt, and a green Tyrolean hat, bursts into the room. She quickly levels a carrot at a student seated in the first row and shouts: "Federal Herring! You stole my marks!" Outside, in the corridor, a popping sound is heard.

A student in the front row clutches his breast, screams, and falls to the floor. As the assailant runs out, two men dressed as ambulance attendants enter the room, drag the victim to his feet, and quickly carry him away.

The whole scene has taken almost one minute from the time the assailant entered until the victim has been removed.

When the class has quieted down the instructor rises to his feet and says: "Ladies and gentlemen, I want all of you to take

a fresh sheet of paper and describe *everything* that just took place in this room. I want you to tell me exactly what happened. I also want complete physical descriptions of the victim and the assailant, as well as of the weapons used. You will also tell me just how long it took this little drama to unfold before your eyes from the beginning to end. Commence writing."

On the face of it, this should be an easy task, especially when we know that this is no ordinary class. All of these students are graduate students majoring in psychology.

The results? One young man, who hopes to become a criminologist, writes: ". . . the killer was a big Germanic type . . . looked something like a Hollywood storm trooper . . . called the deceased an FBI man . . . said he was tired of being a communist . . . the murder weapon was a 7.5 Mauser . . . the victim was a typical-looking student in his twenties . . . white . . . seasonable dress . . ."

Another student, a young woman who hopes to become a clinical psychologist, says: ". . . the murderer was of average height . . . wearing a European-type railroad conductor's uniform . . . used a switch-blade knife on the victim . . . murderer said . . . you are a Marxist and are working to destroy our republic . . . stabbed the victim three times . . . victim was a white male dressed in khaki trousers and a blue sweater . . ."

And so on. Oh, yes! It was not mentioned by anyone that the "victim" of this assault was a male Negro, wearing an R.O.T.C. uniform!

The little episode just recounted will give you something of an idea as to the value of the eyewitness in court. As we have just seen, these students were persons highly trained in the art of observation. They had already spent at least four years studying human behavior, studying the many small nuances of the human mind. We should think that as "experts" they, if no one else, would be detached, would be able to record events with a great degree of precision. For, after all, if the experts can be wrong, what of the man in the street who glimpses, for perhaps



five seconds, another man running out of a liquor store, a bag of money in one hand and a smoking pistol in the other. Or was it a pistol? Perhaps it was just a cigar.

Most of us see what we wish to see, and even that none too clearly. We live in an age of noise, of gaudy motion, of such incalculable distraction that it is impossible for the eye to record very much, and even less possible for the memory to retain anything thus recorded for very long.

And yet each day, in courtrooms all across the land, people take the stand and solemnly testify to events they would like us to believe they witnessed sometimes as much as two years earlier.

Legal history abounds with cases of mistaken identity. Almost weekly we read of some poor man who, after spending ten or fifteen years in prison, is released because some eyewitness was mistaken. Innocent men have been executed because someone swore, under oath, that the accused was the same person who pulled a trigger or wielded a knife or was behind the wheel of a car.

Human memory is a frail and precious thing. Stop, for just a moment, and see if you can remember what you had for dinner last night. The night before? What is your driver's license number? If you are a man and you have received military training, what was the serial number of your rifle?—the serial number you were required to commit to memory! What is the color of your husband's—your wife's—eyes? In which hand does the Statue of Liberty carry a torch? Quickly, tell me which direction north lies in! Finally, are you absolutely certain that you locked your front door last night, before going to bed? Assuming that your life were at stake as a result of a false answer to *any* of the above questions, what would you say?

With all humility, you and I and all the rest of us would have to say: "I cannot be sure, for a fact."

But what of the eyewitness in a criminal case? What of the people's witness who takes the stand and solemnly testifies that

the accused, sitting a few feet away, was the person who held up his liquor store or who was seen running down a hotel corridor at three o'clock in the morning. How can a person be so sure?

To begin with, our eyewitness has undoubtedly seen the accused, though perhaps not at the scene of the crime. No, the eyewitness's acquaintance with the accused probably commenced sometime after the crime had been committed. More likely than not, the victim and the accused were introduced through that age-old introduction bureau, the Police Department. Let me give you an example.

You are a small businessman. You own a combination liquor store and market. As a small businessman you probably have no other employees; you open the store in the morning and close it at night. In between, you arrange stock, wait on customers, beat off persistent salesmen, and try to get your bills paid on time. You are beset by most of the worries that confront all of us: money, sickness, taxes, dreams of a better tomorrow. Money comes in and money goes out and, hopefully, somewhere along the line enough of this money may stick to your fingers to allow you to retire someday, in peace.

It is late evening now. You have been on your feet for about ten hours and you are tired. You look at your watch and, like most of us, you forget the time about five seconds later. You know, after looking at the watch, that you will be able to close up shop in a little while. Perhaps you light a cigarette or look at the day's receipts as you mark time, waiting to close. Your feet may hurt, for you have been standing erect for most of the day. In brief, your mind is probably distracted by a thousand and one little problems.

A man comes into the store. He walks to the refrigerator, opens it, takes out a six-pack of beer. Automatically, you know that this six-pack retails for one dollar and, say, twenty-five cents. If you see the man, you see him only as another customer; another face to smile at, another few pennies to add to your net profits for the day.



The man approaches and perhaps he says, "And a package of Camels, too." You turn your back to get the cigarettes from a rack and, when you are facing the man again, he has a pistol pointed at your stomach.

"Give me the money," the man says.

What do you do? What do you think, standing less than two feet away from a man who, with pistol in hand, has just told you to give him ten hours of your hard labor? If you resist, he may shoot you. You have read, somewhere in yesterday's paper, that another little store owner in this city was pistol-whipped and wounded in the arm by such a gunman. If you are able to think at all, while this pistol is trained on your stomach, you will probably think of your wife, your children, the unpaid insurance policy on your life, school for the youngest child, the operation your wife needs . . .

If you think at all, you will think that you do not want to die and better give him the money, the ten hours of your labor, than to lie bleeding and dying on the floor as you pray that the ambulance will arrive in time enough to save your life.

You open the cash register and you give the gunman the money. He stuffs it in his pocket and quickly leaves the store. In all, the whole transaction has taken less than ninety seconds.

You watch the man run down the dark street, see him get into a car or perhaps run around the corner. Then he is gone and you are alone with your empty cash register. You are torn by emotion, enraged that you have been robbed, thoroughly frightened, for you saw death inside the muzzle of that man's pistol—and perhaps that was all you really saw as he stood before you, waiting for you to hand him the money.

You telephone the police and perhaps you garble the message so that the police operator asks you to repeat it several times. Then you sit down, trembling, barely able to control yourself. You may be a little ashamed at how easily you were robbed. You may feel a great sense of relief that you were not pistol-whipped or shot. But, no matter how you feel, you do not feel "normal." You have been through a harrowing experience, some-

thing that has never happened to you before, and even as you wait for the police you try to sort your thoughts out, try to calm yourself, for you know that the police will have questions and you must have answers for them.

The police arrive and they *do* have questions. They want to know *your* name, *your* address. They want to know when the holdup took place. What was the exact time? What did the holdup man look like? Color of eyes? Color of hair? Type of clothing worn? Height? Weight? Peculiarities? Kind of gun? What did he say? How did he say it? Did he have a getaway car? Did he handle anything in the store?

Your mind is swimming as you try to make some sense out of these strange, new events. You want to tell the police: "This has never happened to me before; you must give me time to think." But the police, as you can see, are in a hurry. Perhaps one of the patrolmen gives you a few hints. Perhaps he says something that serves as a stimulus to your memory. Perhaps he shows you *his* gun and asks if it is similar to the gun the robber carried.

The police finally leave. You close up the store, trying to remember just what happened. Already, the whole thing seems to be a kind of hallucination. What *did* the holdup man look like? Somehow, you have the impression that he looked something like your younger brother. Or maybe it was Robert Taylor, the movie star, that he resembled. It is so hard to remember; so much happened and the police asked so many questions.

But the police seemed to know what they were doing. This is their job, you tell yourself. They'll get the right man. They'd *better* get the right man; they're civil servants! You pay their wages.

When you get home you tell your wife and your children about what happened to you. Neighbors come over. Everyone has questions to ask you. Perhaps you add a little to the story, for now you may have the idea that you behaved badly in the store, tonight. You didn't put up the kind of fight Humphrey



Bogart would have fought, had he been in your place. You didn't tell the stick-up artist to go to hell. You didn't throw a bottle at him as he ran out of the store with your hard-earned money. You did none of these things and, while you have no right to feel ashamed, you still do.

Three days later the police telephone you. They believe they have the man who did it, they say; just come down to the station house and identify him. Just a formality, they tell you; it is the same man.

You go down to the station house, a little relieved that the police have apprehended the man. Perhaps they recovered the money too. As you hurry to the police station, any doubts you may have had about the holdup man's identity leave you. The police must know what they are doing. Sure! They have the right man. Just like on the television, they always get the right man. You smile and you feel a little proud of your Police Department. You'll have to remember to buy a ticket to the policeman's ball, next year.

Now you are inside the police station, in the line-up room. The detective in charge of the case shows you a photograph of the suspect. He gives you plenty of time to study the features of the man on the photograph, both full face and profile. Yes, it *does* look like the man who held you up. You hand the photograph back to the detective and he tells you that now some men will walk out on the stage in front of you. You will, in turn, tell this detective which of these men was he who held you up.

Six men walk out onto the stage, their features lit up by the blinding white lights set in the ceiling. You scan the faces and you recognize one of these men; it is the same face you just looked at in the picture the detective handed you. No doubt about it!

"That's the man, Officer," you whisper, pointing at one of the men on the stage. "That's the man that held me up."

You leave the line-up room and sign a formal complaint. The police tell you that the suspect has a prior criminal record of

some kind or other. While the police may not tell you that the suspect was or was not found with the money from your store, with the pistol that was used in the robbery, or even if he made a confession of guilt, they *have* told you he was an ex-convict and that, to your way of thinking, is enough to satisfy you. Once a criminal, always a criminal.

A trial date is set and you are in court. The district attorney puts you on the witness stand and asks you, in front of the twelve members of the jury, if you have ever seen the accused before.

"I have," you reply.

"When was the first time you saw the accused?"

You have memorized the date and the time of the robbery, as the district attorney, before the trial, had suggested. You state, in a loud and firm voice, the date and time of the robbery. You go on to describe the events that took place perhaps three months ago. You have had time to think, you have seen the suspect in the line-up. The police never make mistakes on things like this, you tell yourself as the district attorney finishes his examination.

The accused is represented by a young man who only this year was admitted to the practice of law. He is a sincere and intelligent young man, but he lacks experience. He does not yet know how a line-up is conducted, how certain thoughts and conclusions may be put into a frightened witness's mind. The young attorney does his best to rattle you, but to no avail. In the end, he excuses you and that is the end of it.

The accused is found guilty. In accordance with the laws of your state, the accused is sentenced to prison for a period of not less than a certain number of years. As you leave the courtroom you tell yourself he was lucky; any man who would pull a stick-up ought to be sent up for life!

As the days pass you forget much of what has happened to you. Perhaps you buy a pistol with the intention of using it on the next person who has the audacity to hold you up. You are



regarded as something of a minor celebrity in the neighborhood for a while and then even your neighbors forget about the holdup.

A year passes. One day you receive a letter from the man you helped send to jail. It is a short letter, asking you to search your soul, for he says he is innocent. The letter concludes with a plea to go to the police, tell them that you were mistaken in your identification. For a long moment you stare at the letter, then throw it in the wastebasket. A typical criminal trick, you tell yourself. There he is, stuck in prison for the next five years, trying to lie his way out.

You look at your watch; almost time to close. You go to the door of your shop, and just as you throw the lock the door opens and a man stands before you. He says: "Give me the money, just like last time." He has a gun in his hand and it is pointed at your stomach.

It is the same man who held you up over a year ago. It is not the same man you helped send to prison.

If ever you are called upon to testify in court as an eyewitness, think very carefully before speaking. You may be sending an innocent man to the penitentiary.

## INSTANT TRUTH

MAN STARTED SEARCHING for something guaranteed to make his brothers tell the truth about one hour after he learned to lie. Contrary to the opinions of the "experts" who appear to be willing to state, for an appropriate fee, that they can tell with certainty when a man is lying, we still continue to search for the truth. And in spite of today's highly touted truth serums and lie detectors, the truth continues to remain elusive.

Our search for "instant truth" is as random and as unsuccessful as it was during the time of Moses. Each time Science opens a new door, telling us we may expect to find the truth revealed inside, we find only the grinning face of an "expert" armed with the tools of his trade. In the past the "expert" came to us with the rack, the dunking stool, thumbscrews, or a set of red-hot forceps. Lately, they have taken to carrying hypodermic syringes and lie detectors.

Many of these experts would have us believe that a combination of Science and the Almighty have endowed them with the same powers that the old-time "water witches" were supposed to have had as they roamed about barren farmlands, armed with willow switches guaranteed to bend each time the "witch" passed over a hidden pool of water.

Of the two "experts" I prefer the water witch; he was willing to admit that he didn't understand his magical powers. The best of these witches, by the way, would not charge you a cent if they could not find any water. The truth expert, however, will tell you that he finds truth each time he searches for it. Unfortunately, it is usually impossible to verify his results.

History abounds with devices that were, according to the experts, guaranteed to compel a man to tell the truth. Trial by ordeal, as practiced during the various European inquisitions, is probably the best known of these devices. It was assumed, in those days, that if a man was properly tortured for a sufficient period of time, the truth would flow from his lips as wine from a broken jug. The average man, free from the clutches of the torturer, tended to accept evidence obtained from agonizing periods of abuse deep inside the inquisitor's cellars.

Later on, when the experts became too zealous in the performance of their labors and began torturing the wrong people—noblemen and others in positions of power—the people became quick to renounce the experts and their various "truth techniques." Indeed, many of these "experts" were to spend their



last days being subjected to torture by the use of the same implements they had used on others. In the end the tortured experts, like those who had gone before them, gladly admitted their complicity in pacts with Satan and other supernatural plots against the Crown.

Trial by jury of one's peers gradually replaced the torturer's rack. True, there were some dark intervals when such enlightened citizens as our own Cotton Mather had a tendency to backslide toward a return to the old ways. But by and large the tendency in this country was to think that about the only sure way the truth of a thing could be finally determined was in a court of law.

And then came Dr. House.

Dr. House was a Texas obstetrician, a profession not, on the face of it, related to lie detection. Dr. House also appears to have been a kindly man, a man who was perplexed and upset by the anguished cries of women as they went into labor with child. Sometime during his years of practice in the early 1920s, Dr. House experimented with his patients in an attempt to ease their pain. He gave them a drug called scopolamine, a preparation that relaxed and tranquilized them in somewhat the same way narcotics tend to relieve pain and suffering.

While his patients were under the influence of scopolamine, Dr. House discovered that they talked freely, discussing things they would not normally speak of. So, like many a dedicated amateur, Dr. House was quick to rush to the newspapers with his new discovery. The newspapers, in turn, were quick to give this new drug a name: "truth serum."

There was considerable publicity connected with the use of scopolamine and similar drugs—sodium amytal and sodium pentothal—for the following years. Then, more level-headed medical authorities began to investigate Dr. House's discovery. They concluded that scopolamine and the other "truth drugs" had far more drawbacks than benefits. For one thing, many persons

under the influence of these drugs continued to tell lies. Other persons tended to repeat whatever the doctor giving them the drug told them to say. And some neurotics, when drugged, would confess to crimes they could not possibly have committed.

In the end, medical authorities agreed that the effect of truth serums could be likened to the impact of five or six tumblers of fine Kentucky bourbon, taken within the space of a few moments. Both of these preparations make talkative persons talk; neither is noted for its ability to make talkative persons tell the truth.

While many psychiatrists in this country employ the use of drugs that could be compared to "truth serums," they recognize that anything the patient may say while under their influence must be carefully evaluated on the basis of the patient's make-up. None of these psychiatrists, by the way, will ever go on record as saying that such a thing as truth serum exists.

Perhaps the greatest and the most unwanted impact of Dr. House's discovery was its criminal application by totalitarian governments. During the 1934 trials in Nazi Germany, following the burning of the Reichstag, or parliament building, the gestapo produced a suspect in the person of one Marinus Van der Lubbe. It was freely acknowledged that Van der Lubbe had been drugged with scopolamine and interrogated for weeks prior to his trial.

At the time of Van der Lubbe's trial journalists pointed out his general appearance and conduct, stating, ". . . the accused was slovenly . . . drooled upon his shirt . . . had to be led many times by the prosecutor . . ."

Van der Lubbe was "tried," found guilty, and shot. His innocence was later established beyond question; Goering had started the fire as a political move to cast discredit upon the opposition. Van der Lubbe? Merely a neurotic, dimwitted petty criminal who would testify that the moon was made of green cheese, while under the influence of "truth serum."

During the Moscow trials in the late 1930s, Russian interrogators worked overtime in the basement of the Lubianka Prison as they pumped suspects full of pentothal, amytal, and scopolamine. A few lives were lost due to the overzealous administration of these drugs, but totalitarian countries have never been noted for their practices of supply economy when dealing with human lives. A few more mass arrests, another group of "suspects," a liberal supply of "truth serum," and the "guilty" are ready for trial.



Perhaps the disgust felt at the use of these drugs by the police in America may be explained on the grounds that they are so often associated with tyranny. As a man is known for his deeds, so is a dictatorship known by its practices.

The 1920s produced truth serum. During this same era we also encountered marathon dancing, the Thompson submachine gun, Prohibition, flagpole sitters, the St. Valentine's Day Massacre, and goldfish swallowers as representative forms of American self-expression.

It was also during the 1920s that the polygraph, or lie detector, was first introduced in this country.

The lie detector does not measure truth; proof of this subtle quality cannot be found by a machine. What the lie detector *does* measure are emotions; body responses in the form of pulse, blood pressure, respiration, and perspiration. The theory behind the use of the lie detector is that the subject's physical reactions will betray him when he is asked certain questions. While the subject's words may be lies, say the experts, his bodily reactions will shriek out the truth.

If the polygraph were somehow magically endowed to ferret out the truth we should all probably be the better for it. But this is not the case. Without an operator the machine can no more function than can an airplane without a pilot. And here is the crux of the matter: the operator.

Let us consider, carefully, just what the operator's duties are in connection with the polygraph. For one thing, this gentleman must be a highly skilled psychologist, for the questions he will be asking the subject and the interpretations he will attach to

the subject's answers may very well mean the difference between freedom and years in prison. And in some cases the operator's mistakes could cost the subject his life!

The operator of the polygraph should certainly be a physician, preferably a well-rounded diagnostician who is able to determine if his subject might have certain physical conditions that could wrongfully influence the tests. It would also be a good thing if the operator were a toxicologist or at least a laboratory technician who could, prior to running the tests, take samples of the subject's blood and urine for analysis. It is not uncommon for some persons to drug themselves with tranquilizers or sleeping pills before they take a polygraph test and a person in such a state should certainly not be questioned.

A rather imposing list of qualifications? But I think you will agree that in the interests of justice they are a very necessary set of qualifications. Now, just what are the facts?

You or I or anyone else who had the notion could, with less than a thousand dollars, set up shop as "expert lie detectors." Many police equipment houses sell these devices for about $400; if cash is paid they will also throw in a manual on how to use one. Then, by paying the proper fees and filing the necessary papers, you or I or anyone else could take out advertisements in the newspapers, on television, or over the radio, offering our services to all interested parties. While we might be understandably new to the game of lie detecting it is likely that after we had interrogated a few hundred suspects we might achieve some degree of accuracy. By the time we had been called on to report our findings we would certainly be able to call ourselves "experts." We would have questioned a large number of suspects and no one, looking at the imposing strips of paper we had submitted to our client, would have the vaguest idea of what we were talking about.

That, you see, is the beauty of the lie detection business: we could do our work in private, away from the eyes of physicians, attorneys, and others who could monitor our work. Best of all,



no one could challenge our test results, for we were alone with the suspect when the tests were conducted.

How does the lie detector work? How is the subject interrogated? The subject is usually told sometime beforehand that his honesty and his truthfulness have been questioned. This is guaranteed to upset anyone. Then the subject is given a date and a time and he is told to report to the interrogator who will ask him some questions. As the days pass it may be assumed that the subject's state of mind will be anything but tranquil; the subject knows he is a truthful person, but does the expert?

On the appointed day for examination the subject reports to the office of the lie detector operator. Once inside, the first thing the subject sees is a large chair containing straps and belts. Perhaps it is only accidental that this chair looks so much like the electric chair. Surely, the appearance of the chair cannot be designed to frighten or intimidate the subject, for we know that if this were so his reactions to the examiner's questions would be unduly influenced and could be subject to misinterpretation. No, we shall assume that the chair's resemblance to the electric chair is purely circumstantial. We shall assume that the examiner is the most scientific kind of person, one whose sole purpose is to discover, fairly, independently, and objectively, the truth.

The subject is told to seat himself in the chair. The expert is closely studying him because his textbooks have told him that this pre-interrogation period is very important.

"Guilt," the expert's textbooks say, "can often be detected prior to examination by the subject's dry mouth . . . continual yawning . . . unnecessary body movements . . . licking his lips . . . fidgeting . . . scratching . . . protesting that he is uncomfortable . . . complaining that he has another appointment . . . manifesting a bitter attitude . . . making feeble jokes . . ."

This information comes as something of a pleasant surprise to me. I have been searching for a sure-fire way to detect the truth for most of my life. The next time someone "yawns," or "licks his

lips," or even "complains he has another appointment," I shall certainly have to conclude that he is lying.

The next phase of the examination begins as the operator straps the subject into the chair, placing various cuffs around his chest and wrists. An air-filled belt is placed around the subject's chest. Changes in the subject's blood pressure will be measured by an inflated cuff placed around his arm. Electrodes placed in the palm of the subject's hand will measure a form of galvanic electricity, for it has been assumed that lying subjects are most often sweating subjects.

And what of a subject who has a natural tendency to perspire freely? Or a subject who has a heart condition that tends to interfere with the regularity of his pulse? Or a subject with asthma, bronchitis, or even a missing lung? These conditions are certainly not the concern of the operator, for he is not a physician and he cannot take them into account during the course of the examination. No matter. We have the examiner's word that his machine is "ninety-five per cent accurate, regardless of the subject's physical condition."

The tests will usually begin with a "card trick," designed to impress the subject with the machine's accuracy. The operator will give the subject ten playing cards, ask him to mentally select one, and then return them to the operator. Then the operator will ask the subject if he took the ace of hearts, the king of hearts, and so on. Each time a question is asked the subject will be obliged to answer with a simple No. In this manner the operator will often be able to predict the card the subject took, for when the correct card is mentioned and the subject says No, the various gadgets recording the subject's emotions will probably register more mightily on this occasion than they did on the others.

From card tricks the interrogation will move swiftly to matters more pertinent to the proceedings. If the subject stands accused of some kind of theft he will be questioned about it; he will be questioned about everything he ever took. The operator's questions will take him back to his childhood, then through school and manhood. Again, the subject will be obliged to answer all questions with a Yes or a No.



If the operator has been reading his manual he will, as the interrogation progresses, infer that the subject is not telling the truth. He will accuse the subject of lying to him; he will shake his head sadly as the subject responds to a question. He will try to confuse the subject; he will ask questions that cannot possibly be answered with an affirmative answer or a negative answer. The operator will behave as a policeman, not as a scientist.

The operator will do everything in his power to jolt the subject, to create an atmosphere charged with emotionalism and not the truth.

How accurate is the lie detector when it is used under these conditions? In one case, reactions interpreted by the polygraph strongly suggested that a man had done something wrong in spite of the fact that he steadfastly maintained his innocence. He was given a second test and this time he was cleared by the machine! Why?

In the first test the apparatus that measures breathing showed a distorted pattern. Prior to taking the test the man had told the operator that he had a skin rash on his chest but that he didn't believe this would make a difference. The operator said nothing at that time, perhaps assuming that the subject's comments could be interpreted as: ". . . protesting that he is uncomfortable . . ."

When the second test was taken, the breathing apparatus was moved somewhat lower on the subject's chest, avoiding contact with the area of the rash. And the difference between truth and falsehood—in this case, a skin rash—was shifted by a scant few inches.

In a recent Chicago case, one involving rape, several suspects were questioned by a polygraph operator. All were cleared of the crime. Several weeks later a new suspect was questioned in connection with the rape. The polygraph said he lied. The suspect protested that he was telling the truth. In spite of the suspect's

denials of guilt he found himself arrested, indicted, and on his way to court.

Some time after this man had been arrested a second rape was committed in the same neighborhood as the first. The police had a suspect: one of the men who had been questioned and cleared in the first crime. While he was being interrogated this man confessed to *both rapes!* It is hoped that the Chicago authorities now have the right man under arrest.

At this time the findings of a polygraph examination cannot be introduced in court in criminal or civil actions. Evidence obtained from polygraph examination is considered inconclusive. If such evidence *could* be introduced neither the trial lawyer nor any witness he might retain would be able to make sense of the polygraph results. They would simply have to rely on what the operator of this machine told them: that neither force nor threats were used during the course of the examination.

The lie detector may have some value in the years to come. As it stands now it is frequently used by the authorities as a tool to intimidate, to frighten, to confuse the person being interrogated. A product of science, the polygraph is most often used in an unscientific way. It is something like giving a gorilla a fine Swiss watch and a bench of precision tools, and then asking him to repair the watch.

No one need take a polygraph test under any circumstances. One of our most basic rights is the privilege of remaining silent. It is the job of the prosecution to prove that he who stands accused is guilty. The accused, by law, is not required to say one word in his defense. He who allows the prosecution or the suspicious employer to strap him in a chair and conduct examinations that would never be tolerated in a court of law is selling his birthright for a mess of pottage.

Law requires that poison be labeled with a skull and crossbones, so that even a small child may see the danger before him. We ought to have the same kind of law for the lie detector.

# Personalities and the Law

# MR. DISTRICT ATTORNEY

I CAN THINK of no other particular field of the law that is more popularly misunderstood than that occupied by the prosecutor, the district attorney. Most often, the district attorney is thought of as a heartless, snarling wretch who is continually after the defendant's neck. Such persons exist, of course, and their daily utterances in court, or to members of the press, seem to satisfy the needs of certain deranged citizens in every community. "Murder foul," screams one of these prosecutors, pointing his finger at the defendant, hoping that the jury will subsequently retire and decree that the state practice a little "murder foul" upon the defendant.

Who is the district attorney? Well, he is really *your* representative in court. He speaks for the People and he is charged, by law, to prosecute any and all lawbreakers who come his way. The district attorney is a kind of legalistic policeman, the one ultimately responsible for investigating and subsequently prosecuting him who has broken the law. This job, by the way, can be a great strain upon a man who as district attorney may know that the law is wrong, but has no other choice than to prosecute.

District attorneys are like all of us; they come in varying shapes, sizes, and colors. Of course the district attorney himself does not prosecute all the criminal cases that come into his office unless he is in a very small town. In cities he will have a staff of assistants. Many assistant district attorneys are young men, not long out of law school, and their function is somewhat like that of the intern in medicine; they know theory but they must have

"warm bodies" to work on until theory and practice have melded into one. Many of these young men work in the prosecutor's office for a few years and then leave, going into private practice and later, perhaps, politics. The Chief Justice of the United States Supreme Court, Earl Warren, followed such a path, being district attorney of Alameda County, California, many years ago.

The district attorney first comes into a case when a person has violated the law and has been apprehended. I ought to qualify this statement by saying that when it is *assumed* a person has violated the law we immediately impute guilt to him. Because the district attorney's office is not staffed by psychologists, it is difficult for them to appreciate that the offender is a man with a personality and that personality is the result of an interaction between disposition and environment; that the individual act is the reaction of this personality to a definite, external situation. The district attorney, for all his enlightenment, could do nothing save prosecute, even if he knew that the defendant, as a product of disposition and environment, could not avoid the hereditary disposition with which he is equipped any more than he can help the environment into which he was born.

My friends, what the district attorney's office is up against is this: Few human beings have any "free will," as such. They do the best they can with whatever the Almighty and the state have given them, but no criminal code in this country is equipped to deal with the diamondlike facets of each individual offender. How can man be reproached for an action if he cannot be reproached for any of the factors which have determined it? Why do we punish?

The office of the district attorney seeks punishment. The jury determines if punishment should be levied. The court metes out the degree of punishment. In all cases, punishment is first asked by the prosecutor for the oldest and most out-of-date reasons imaginable. It is the prosecutor's theory that by using punishment, we induce the person being punished to abide once more by the law, and by this example—sending some wretch off in



chains for a few years—we (the prosecutor, for he is our collective "we") hold up to the members of society, generally, the need for obedience to the law. And when the prosecutor prosecutes, he usually does so with the misconceived notion that the aim of punishment is retribution for the crime, that punishment is really to the benefit of society.

The district attorney, by the laws we have helped make, is truly cast in our own image, for he—like the society we live in—is too much preoccupied with punishment and too little concerned with the causes of social derailment and the subsequent possibilities for social rehabilitation. As we do not punish the whole man for the malignant growth that is eating at his vitals, neither should we punish him who is a victim of hereditary, environmental, and other subtle factors we are still able only to speculate about. But because we refuse to take cognizance of these many and varied circumstances that make up each and every criminal offender, the district attorney has no other choice than to go into court, as prosecutors have been doing for hundreds of years, and demand punishment to the fullest extent of the law.

The defense attorney is most fortunate when he is able to encounter a member of the prosecutor's office who is enlightened enough to realize that the man he is prosecuting is being prosecuted under a bad law. There are many bad laws on our books and most district attorneys are aware of them, though they are powerless to do much about them. In the case of a young man who has been misled by a young girl to believe she is of the "age of consent," this young man could be subject to prosecution on a charge of statutory rape. In spite of the young man's intentions, and with a complete lack of premeditation insofar as his realizing a crime was being committed, many years of his life would automatically be spent in prison and his future, upon leaving prison, would be marred by the stigma of being branded a "sex criminal."

Unless the district attorney is a scrupulously fair person he can, in court, have a powerfully detrimental effect upon the jury. As

I have pointed out, the district attorney is a representative of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all. Theoretically, the district attorney's obligation in a criminal prosecution is not so much that each case be won but that justice be done. As such, he is in a peculiar and very definite sense the servant of the law. The district attorney may prosecute with earnestness and vigor—and, indeed, he should do so—but while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a fair one.

And yet this same district attorney, knowing a bad law, knowing that the defendant's guilt is only academic, must do his job to the best of his ability, for to do otherwise, he, too, could be subject to prosecution. What a terrible dilemma!

Imagine that the following case confronted a district attorney. It concerns itself with George Washington, the father of our country and the commander of our first armies. Washington, if a prosecutor were to have held hard to the law, could have been prosecuted for treason; he was a common traitor to his country—England. His crime was successful and he became the emblem of virtue, the example of everything good in American life. And yet when Washington was laboring so mightily against his own, true country—England—he was committing treason. He was not alone in his labors, nor would he have been the only party subject to criminal prosecution. Benjamin Franklin, during Washington's time, was supposed to have said that the leaders of the Revolution would either have to hang together, else be hanged one by one.

Suppose Washington had failed? Surely, he and our other revered leaders would have been hanged as traitors, and today, perhaps, we would be less concerned about our income taxes than about the love life of a princess. It was only by a series of flukes that Washington and Co. were not hanged. Had the British



continued their efforts to bring about our downfall, their equivalent to the district attorney, perhaps with sorrow in his heart, would have still demanded the extreme penalty for Washington and the others.

This is what I mean about the inequality of the law, the inequality that our best prosecutors may understand but are powerless to do much about. Away from court, the average district attorney will readily admit that most people, deep down in their hearts, have a longing for action and a constant interest in those who act out what they themselves had only thought of doing. The so-called good citizen, they know, enjoys reading about the phenomenon of action, whether by the common sneak thief or by the murderer, or by the policeman who is permitted to act out his most aggressive impulses on the "right side" of the law. Mr. Prosecuting Attorney knows that there is magic in murder; most men have never killed anyone but they persist in reading the obituaries with a great deal of interest and pleasure.

I feel a little sorry for the prosecuting attorney. If he is, like most of us, basically a man good of heart, he must often be called upon to demand penalties he does not believe in. He must follow the brutally narrow course of law that is archaic, today, in a world where we know that the subtle difference between too much insulin and too little sugar may turn a thinking, coherent, decent man into an automaton. The district attorney, really, is most often a terrible swift sword in the hands of an outraged mob; he must cut and slash, though in the end he is the one steeped in blood, not the mob. He must ask for penalties that John Q. Public—supposedly the man he serves—would flinch from asking, were he to know the consequences of his words. Too often it is the district attorney who must send a man to his death, then lie awake in the early dawning hours of the morning, waiting, knowing that before the sun has been too long in the sky his work product will come to fruition and the victim of his prosecution will die. The memory of the victim's death will not soon leave the district attorney's recollections, though it will be so

much cold news in the mind of the great public, the master the prosecuting attorney must serve.

I could never be a prosecuting attorney, though not because I feel such men are not an honorable breed. But I could never prosecute another man because, if it becomes me to instance myself, I say that there is not the wretch so guilty, so despairing, so torn with avenging furies, so pursued by the law, so fearful of life, so afraid of death—there is no wretch so steeped in all the agonies of vice and crime that I would not have a heart to listen to his cry, and a tongue to speak in his defense, though 'round his head all the wrath of public opinion should gather, and rage, and roar, and roll, as the ocean rolls and beats against the rock.

## THE FIRST PUBLIC DEFENDER

In theory, neither the rich nor the poor may loiter on the streets at a late hour of the night without being able to explain their presence properly. In practice, you and I both know that the police will never arrest the rich man, should they find such a person in a comparable situation. By the same token, if you were given full and complete access to the files of your state's penitentiary, you would be most hard pressed to find confined there a prisoner who had once been a man of means. True, the wealthy person does go to prison from time to time; and each time a rich man is sentenced to jail the newspapers herald it on page one, so rare is the occasion.

The wealthy man need not trouble himself, should he run afoul of the law. With his money he will be able to purchase the finest defense attorney available, should his case ever reach



court. In this respect the law is exceedingly democratic; when one is able to afford seasoned counsel, each and every one of the defendant's many and varied rights will be scrupulously protected.

But what of the poor man, the class of man who makes up more than 90 per cent of all the defendants in all the criminal actions? While it is true that the law stipulates that all who are brought before the bar of justice may be, and should be, represented by counsel, the fact remains that many of these unfortunate persons "cop a plea" or plead guilty without benefit of ever consulting an attorney. Most tragic of all, I think, is the plight of one who has been in trouble before; recent studies indicate that the recidivist will more often simply plead guilty to whatever charge the People have brought against him. Needless to say, most of these persons are usually unable to secure the services of an attorney or, in their understandable ignorance of the law, have the notion they can represent themselves without benefit of counsel. I do not believe that this is right; when a man stands accused in a court of law he needs as much assistance as is humanly possible, just as a man needs the finest medical facilities available, should he be contemplating major surgery.

Most of my fellow lawyers—especially those of us who are on familiar ground in the criminal courts—take on many cases that are known, in the vernacular, as "charity jobs." If we receive any remuneration for our services it is a token fee, usually a small sum fixed by the court. Like physicians, most of us recognize the obligation foisted upon us from the moment we were admitted to the practice of law: to insure, whenever possible, that a defendant, in spite of his income or his background, receive a fair trial. For, in the final analysis, it is only when the defendant is represented by legal counsel that he truly *can* receive a fair trial in every sense of the word. Without the presence of his lawyer, the defendant finds himself in the loneliest place in the world: the bar of justice. Walking into court without an attorney, the average defendant in a criminal action is lost and frightened by

the awful, intimidating majesty of the incomprehensible machinery of Justice.

But even those of us who, in private practice, do our best to represent such indigent defendants as time allows cannot deal with more than a fraction of all the helpless and poverty-stricken defendants that come our way. Fortunately, we have in the United States a system that has gradually become part of our judicial structure simply because of the great numbers of poor who find their way into our criminal courts. These indigent defendants, as a result of the combined pressures of history and the sheer weight of numbers, may avail themselves of the services of the public defender. A lawyer highly trained in defense law and especially retained by the state to insure that each and every defendant, regardless of his circumstances, be given adequate representation when his day in court arrives. Los Angeles, California, was the first municipality in America to formally enact such a concept, in 1916. Today, almost all of our larger cities offer the penniless defendant the services of this skilled professional, the public defender.

To those of you who have automatically assumed that without the services of a "high-powered criminal lawyer" a man did not have a chance, perhaps news of the public defender system will come as something of a surprise. To the others—those who would say America leads the way, as usual—I offer a word of moderation: the public defender system is neither new, nor is it peculiar to America. Like most of the things we live with and often take for granted, the role of the public defender has a long and honorable history.

About seven hundred years ago a man named Ives of Brittany served the poor without either thought or desire for reward. Ives belonged to a noble family and he had had every conceivable educational advantage. In his fourteenth year his parents had sent him to Paris, where for seven years he studied theology and canon law, important religious-legal concepts that heavily tended to guide the courts of that day.



When he concluded his studies in Paris, Ives went to Orléans, France, to study Roman law. At the age of twenty-three he concluded his studies in Orléans and from that time until the day of his death he dedicated himself to the cause of justice as it concerned itself with the poor, the unwanted, the friendless. Without compensation of any kind, Ives of Brittany assisted the widow, the orphan—anyone who was brought into the courts, and came without counsel.

During his later years it is written that Ives was ordained a priest. He did not, however, choose this moment to retire to the relative comfort of a monastery, nor did he, like so many at that time, use his clerical offices to win favor with the Crown, perhaps hoping to build a minor duchy for himself. No, Ives continued his work, alone and unheralded. He was that most rare breed of man: He never worshiped money, giving all he had to the poor. As the years passed, his good works earned him the honorary title of Advocatus Pauperum: the Lawyer of the Poor.

Ives of Brittany died in 1303, and by 1347 the all-powerful Church, as a tribute to the man and the charitable work he had done in his lifetime, canonized him St. Ives. Today, all lawyers know of him; he is our patron saint.

Equal justice for all, I should like to add, is hardly a modern revolutionary concept, nor is it peculiar to America. Although the poor, befuddled defendant who comes to our courts in legion numbers daily may not be able to see him, those of us who are called upon to defend this man—if we stop for a moment before the inexorable wheels of Justice begin to grind—will surely feel, in that courtroom, the presence of St. Ives of Brittany, our first public defender.

# PORTRAIT OF AN IMAGE: MR. JUSTICE HOLMES

WE HAVE always lived with a certain amount of fraud in the land. In the old days we had such personages as Bat Masterson, acknowledged procurer of women, fobbed off as the finest sort of fellow. General George Custer, an incompetent whose greatest blunder was blamed on his subordinate, Major Reno, was another personal fraud whose exploits, as we know today, were so much hokum.

Today liars, windbags, and other perpetrators of verbal swindle are said to have "an image." We are told, for example, that a popular contemporary politician must have a certain kind of "image" before the public, while, in fact, he may do many things that directly refute what he has said. Movie magazines tell the childish—in years and in mentality—of a certain handsome young star in Hollywood who is seen in the company of countless beautiful young women every week. This young man is given an "image" of virility, while the enlightened know better. So does his attorney, who kept the sordid news of his arrest, in the company of other attractive young men, from the newspapers.

Having qualified the long and involved history of verbal fraud, let us now consider the "image" of Mr. Justice Oliver Wendell Holmes . . .

Mr. Justice Holmes has always been thought of as a kind of witty liberal. While today's schoolboy could not pinpoint any one phase of Mr. Holmes's liberalism, he would certainly not be of the opinion that Holmes was a "reactionary." Nor would most people, for that matter, so successful has the "image" been.





This sort of behavior, by the way, always reminds me of that old refrain, "The song is over but the melody lingers on."

Holmes was no more a liberal than President Kennedy is a Moslem. A careful examination of Holmes's record during his period on the bench of the United States Supreme Court discloses that he went along with the majority about ten times more frequently than he dissented.

Mr. Justice Holmes, in the words of a gambler friend of mine, was the kind of man who played it very close to the vest. He relied on small but steady house percentages, never being inclined to take the dice in his own hand and stand away from the crowd. Most important, it is to be noted that Holmes, during his long life, did nothing to change public opinion regarding his alleged "liberalism." To the contrary, he did everything possible to further the myth.

It is my premise that Holmes, as a result of his legalistic barometer readings of public opinion, as a result of his image building, did more to undermine and lay waste to our precious Bill of Rights than *any other judge in our history!* As for proof, I offer the following.

In January, 1932, Holmes read his last opinion before the Supreme Court. As you will recall, 1932 saw the beginning of the end of "The Great Experiment," a piece of legislative stupidity known as the Volstead Act, or Prohibition Law. The case Holmes was concerned with was that of a Mr. James Dunne of Eureka, California.

Defendant Dunne had been found, according to the prosecution, to be in possession of certain potables—liquor—something he had in common with only about 75 per cent of the adult American population. By law, however, Dunne was guilty of a felony. Accordingly, he was tried in California on a three-count indictment.

To backtrack for a moment, it is of interest to examine the three-count indictment. The first count charged Dunne with the crime of keeping liquor for sale. The second count charged him

with possessing liquor unlawfully. The third count dotted the *i*'s and crossed the *t*'s by charging Dunne with selling this same liquor.

Someone, it would appear, wanted a slice of Mr. Dunne's hide.

At the conclusion of the trial the jury found Dunne to be not guilty of the second and third counts; unlawful possession and unlawful sale. The jury did, however, somehow find him guilty of *keeping* liquor for sale.

Perhaps mystified by the jury's logic, Dunne appealed his case. The evidence as to the three offenses, it should be noted, was the same in all cases. If Dunne was innocent of unlawfully possessing liquor and innocent of unlawfully selling liquor, how could he possibly be guilty of having this same liquor for sale? No matter. Surely, when this case of mangled justice reached the Supreme Court of the United States of America, the learned members of the court would swiftly see that Dunne had been "done." Surely this august body, after examining the evidence, would readily see that there was simply no case against Dunne. Even someone not connected with the law could, simply by using a little common sense, readily come to the conclusion that Dunne was no more "a little guilty" than is a woman "a little pregnant."

Accordingly, Dunne's case was studied by the Supreme Court. After due deliberation our "great liberal," Mr. Justice Oliver Wendell Holmes, delivered the majority opinion, whereby he spoke for himself as well as the other, concurring justices.

Here is what Mr. Image said:

> Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate offense. If separate indictments had been presented against the defendant for possession and maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as res judicata of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold.



Discounting Holmes's peculiar logic for a moment, let us consider the effect his opinion would have upon all of us. The learned Mr. Justice Holmes, in laying down the law on the Dunne case, said that double jeopardy—trying a man twice for the same crime—was hereafter the order of the day. Had Holmes had his way, we would today be living in a police state more cruel and vicious than any of us can imagine.

Possession of liquor, in the Dunne case, was an included offense in the count charging him with keeping liquor for sale. Under the Prohibition Law—or any other law—it simply defies the imagination to understand how a person can keep liquor for sale without possessing it. A first-year law student knows this much and if he were to parrot Holmes he would surely be thrown out of school on his ear!

I must conclude, after studying the Dunne case, that Holmes either had no common sense, absolutely no knowledge of the law, or . . . he rather cynically went along with the times. Either the "great liberal's" intellect was asleep, I must conclude, or he, like so many others, did not want to "rock the boat."

A broad and comprehensive examination of Holmes's long career discloses that, except for manufacturing cute sayings and beaming widely each time he was touted to be a liberal, the man was no liberal at all. When the chips were down, Holmes was quick to retreat. He was a man born to cut bait where the braver did all the fishing.

If the liberals must have an idol, one who was honest in both judgment and purpose, they would do well to consider Justice Pierce Butler, a man more concerned with truth than image. Curiously, Butler's "image" was poison to the liberal element. Perhaps this able jurist was more concerned with keeping our Bill of Rights intact than with whitewashing the public's opinion of his personal affairs.

Here is what Justice Butler had to say in the same case:

> Excluding the possession negatived by the finding of the second count, there is nothing of substance left in the first count,

> for its specifications were limited to the keeping for sale of the identical drinks alleged in the second count to have been unlawfully possessed. . . . The evidence having been found insufficient to establish such possession, it cannot be held adequate to warrant conviction under the first count. The finding of not guilty is a final determination that possession, the gravamen of both counts, was not proved.

Judge Butler, concerned more with the law than with his image, saw not only the inconsistency of Dunne's "partial guilt" but, further, was aware of the effect Holmes's decision could have upon all of us, for Holmes had quite plainly said that if one jury acquitted Dunne he could still be subsequently tried until such time as some jury, somewhere, would find him guilty.

It seems strange that Holmes could have been such a poor lawyer. Not only did he prove himself to be illogical but he was completely ignorant of the doctrine of included offenses, in the bargain. Hardly a liberal, Holmes was a lawyer only by sufferance.

But that may be explained, too. The law does not require that a justice of the United States Supreme Court be a lawyer!

Justice, anyone?

## WHAT'S IN A NAME?

THE FOLLOWING appeared recently in a local newspaper:

> Eugene Weingand, 29, a Los Angeles real estate salesman, looks like Peter Lorre and talks like Peter Lorre. But now he wants to be Peter Lorre, and the 59-year-old actor is not sympathetic.
>
> Lorre's lawyer told Judge Philbrick McCoy yesterday that the actor is vigorously opposed to Weingand's petition to change his name—to Peter Lorre.
>
> The judge set a hearing for October 3.



All of us, after showing proper cause, may legally change our names. While laws tend to vary from one state to the next, it is usually the rule that a petitioner must take out a small advertisement in the "Vital Statistics" section of the local newspaper, stating his intention to change his name. For those who want to kill a few hours, a study of the Vital Statistics section will often reveal some fascinating trivia in the form of petitions to have a name changed. It seems not so long ago that I recall seeing a certain lady's name being changed from Evelyn West to Evelyn $50,000 Treasure Chest West. Miss West is a stripper and such a name would, I suppose, be in keeping with her occupation. However, it is well that the day of Captain Kidd and other, assorted nefarious pirates has passed.

As to the matter of taking another's name, however, I could paraphrase Iago: ". . . who steals my good name steals my life." Names, of course, are our life. We are stuck with them at birth and although Willie Stinchfield, upon reaching legal age, may change his name to William Stine, he will always be known to his childhood friends as Stinky. No matter where Mr. Stine may go, every time someone yells Stinky, he will turn around, if only for a moment. His name changed and money in his pocket, he will still be Stinky of old.

I am not surprised that Mr. Lorre "vigorously opposed" petitioner's move to change his name from Weingand to Lorre. Let us consider the years Mr. Lorre has spent assiduously building his character so that even the young among us will instantly recognize it. True, Mr. Lorre has never been a "star" in the strictest sense of the word; he has been more. He has been the spice, on many occasions, that has made a Hollywood turkey edible. Laboring long and hard in the vineyards of Southern California, Mr. Lorre has systematically made his name synonymous with villainy, chicanery, and other nefarious cinematic doings. From his first film, *M*, to the long series he made for Warner Brothers in the 1940s, who can forget his menacing performances? It seems only yesterday that he was selling Clark

Gable down the river in *Strange Cargo*. And who can forget his machinations in *Maltese Falcon* as he did his best to swindle Humphrey Bogart and Sidney Greenstreet out of the big black bird?

The newspaper article further states that petitioner Weingand is a realtor, a professional calling sometimes associated with the early activities of Jim Fiske. Now, I wonder just what purpose Mr. Weingand has in mind, wanting to change his name to Peter Lorre? Is he hoping to intimidate a little old couple from Southgate into selling him their home at below market value? Is he planning on peddling an old, abandoned house with the stipulation that buried treasure is hidden beneath the floor boards, along with a body he planted there in some now long-forgotten assassination?

History has been most unkind to those who, legally or otherwise, took the good name of another, for whatever reason. Before we had social security numbers, fingerprint identification, and other modern means of continually establishing character through established data, a man's name was his passport.

Traditionally, names have been associated with one's occupation. Carter, for example, is an old English name that is associated with one who operated a cart; Johnson, the son of John. While I do not know the origin of Mr. Lorre's name, we all do know what it is associated with; it is his fortune and he has earned many times over any recognition he receives from it.

If Mr. Weingand wants a name associated with notoriety, why not John Dillinger? If he would prefer to be only a minor celebrity, he could start out with Pretty Boy Floyd, gradually working his way up to Mad Dog Coll, thence to Abe "Kid Twist" Reles. After five or six years he could make a final appearance in court and petition to have his name changed from Reles to Alphonse Capone. With the current boom in things smacking of the Roaring Twenties, his fortune would surely be made. Unless, of course, a few old-time Capone antagonists still existed.

I cannot predict the outcome of Mr. Weingand's date in court. I truly hope that his petition will not be granted; one Peter Lorre is enough. With two of them in circulation, I am sure Mr. J. E. Hoover would go before Congress and demand another million dollars of the taxpayers' money to guard us against a double menace.



## FINE PRINT

HISTORIANS would be hard pressed to find an example of sophisticated hatred rivaling that which Aaron Burr and Alexander Hamilton felt for each other.

Many and varied were the reasons that caused Burr to loathe Hamilton and Hamilton to detest Burr, but in each instance an essential element proved to be either money or power.

The backgrounds and characters of these early American giants were strikingly similar, and therein lies the probable answer for the intense mutual hatred. It is a basic law of physics that like poles of two magnets will forever repel one another. Descriptive words, such as well-bred, learned, industrious, ambitious, etc., suited one as well as the other, but many men with those attributes make their way through life without gaining the animosity of a Burr or a Hamilton.

Add greed and jealousy to the list, however, and you discover why these two battled from the day of their first meeting until the day, in 1804, when Hamilton fell fatally wounded during a pistol duel with Burr.

The roles they played in the Revolutionary War enabled Burr and Hamilton to gain considerable wealth and political power, and, like most ambitious men, the more they acquired the more they desired. Fate threw them together on many occasions dur-

ing the long climb up the ladder of success. It is natural that each hoped the other would fall in order that his own journey might be swifter and surer.

During the 1790s, Burr made several attempts to establish a banking concern in his native New York City. On each occasion the move was blocked by the state legislature at the behest of Hamilton. At the time there were only two banks in New York. One was a branch of the Bank of the United States. The other was the Bank of New York, an institution of finance owned by one Alexander Hamilton.

In 1797, after serving six years in the United States Senate, Burr was elected to the New York State Assembly. Hamilton feared the move a preamble to an attempt to acquire a bank charter, but Burr seemed content, during the 1798 session, to occupy himself with bills to establish a state bankruptcy law, to abolish imprisonment for debt, to impose a tax on woodland and unproductive property, in addition to a proposal to do away with slavery in New York.

Burr proved such a willing and able legislator that his re-election the following year was accomplished with ease. And while Hamilton was convinced that Burr was up to something, the legislators who had toiled alongside Burr scoffed at the idea.

On April 2, 1799, Burr pushed through the legislature a bill granting him the right to supply the City of New York with pure and wholesome water.

New York, during the summer of 1798, had been visited by one of the most virulent of those epidemics of yellow fever which so frequently set the inhabitants of New York, Philadelphia, and other large cities to burning niter in the streets, firing horse pistols at the bedsides of sufferers, wearing cloves of garlic in their shoes and bags of camphor around their necks, and liberally dousing themselves with Harlem Oil, Essence of Aloes, and Vinegar of the Four Thieves.

The epidemic of '98 caused a panic in New York, for everyone remembered a similar plague in Philadelphia, in 1795, that resulted in a stoppage of commerce and supply, since few desired to enter a contaminated city. The panic was justified, for New York became a place of horror and death. Whole streets were barricaded or burned. Pest houses were established which surpassed in filth and misery anything conceivable. A system of inspection was initiated, with rewards for informers, which quickly became the instrument of countless personal vengeances. The dead numbered in the thousands.



The epidemic was due to the disease-laden ships that tied up at the New York wharves; it was due to the filth and dead horses, pigs, and dogs that lay in the streets.

Few of New York's populace knew this. Instead, the plague was blamed on the brackish water that offended their taste. Obviously, anyone who promised a regular supply of pure and wholesome water would gain the support of the people.

With this in mind, among other things, Aaron Burr bestirred himself to Albany for the 1799 session of the Assembly and, during the closing days of the legislature, when the members scarcely had time to read it, brought about the passage of his water bill, fixing the capital of the company at two million dollars.

The capital was quickly subscribed and a well was dug during the following summer, followed by the laying of a pipe line to convey the water.

The real purpose of the company, however, was made evident through the opening, at 40 Wall Street, of the Manhattan Company Bank, an occurrence that puzzled, to say the very least, Alexander Hamilton, since he owned the only bank charter other than that of the branch of the Bank of the United States.

Hamilton dispatched his lawyers to investigate and they had little trouble determining the answer. Tucked away among the clauses of Burr's water charter was a paragraph stating that the surplus capital might be employed in any way not inconsistent with the laws and Constitution of the United States or the State of New York.

Hamilton protested, accusing Burr of chicanery in securing passage of his bill. But nothing could be done and Burr had fulfilled his ambition to become a banker.

Actually, Governor Jay, who had signed the bill granting the water charter, was warned beforehand by one who had read it that there was more than pure and wholesome water in that paragraph. There was, indeed.

The Manhattan Company Bank operates today under the original charter. In 1955, when it merged with the Chase National Bank of New York, the intent was to have Chase be the surviving corporation. But the lawyers found that Burr's charter required any sale of the bank to be approved by every single stockholder, which meant that almost anyone could prevent the merger. So the Manhattan Company Bank bought Chase instead, and the Chase Manhattan Bank is the present-day form of the water company and banking business that Aaron Burr started in spite of Alexander Hamilton.

## HONESTY

THE CYNICAL GREEK philosopher Diogenes spent a great many of his eighty-nine years walking the streets of Athens in search of an honest man.

There is no record that he found one.

It is possible Diogenes was unsure of the shape he stalked. Honesty is, to say the least, a complicated quality. The word itself implies many things to many people, but one thing is certain; it is something each of us looks for in others if not ourselves.

When a man acquires the label of honesty he has achieved a



mark of highest respect. To earn such recognition, the man must be straightforward in conduct, thought, and speech. The honest man must be equitable in his dealings, sincere in his relations with others, and free from duplicity.

To say of a man that he is honest is to pay him the greatest honor.

Over the years there has been concern as to the honesty of some members of the legal profession. Of course, such concern is unfounded in fact and scurrilous in intent. No less an authority than the American Bar Association states unhesitatingly that attorneys always have been and always will be honest men.

A New York attorney of the 1840s, named Scheuster, was just an honest lawyer. Unfortunately, most of his clients did not recognize this and were most critical of his methods. Their actions can be excused since they must have been poorly educated, for they insisted on pronouncing his name as Shyster.

To those still wary of the legal profession, may I cite this example of obtaining the services of an honorable attorney.

Recently, a moneylender wrote a letter to the postmaster of a small town, asking for the name of an honest lawyer in that town who would undertake to collect a claim against a borrower who had failed and refused to repay his loan. The reply he received was an honest one. There was no equivocation or mental reservation in the mind of the postmaster, who answered:

> . . . I received your letter this morning. In addition to being postmaster of this community, I am also an honest lawyer, and would not hesitate to undertake to collect a just claim against a debtor who refused to pay it. I also happen to be the person to whom you made the usurious loan that you are trying to collect. I received your demand to pay and I refuse to pay it. I am also the banker to whom you tried to discount my note, and who refused to buy it because as the borrower I had refused to repay the loan. And if I was not for the time being acting in the capacity of pastor filling the pulpit of my church, I would tell you where you could go with your claim.

# LUCIUS BEEBE

My good friend and erstwhile client Lucius Beebe, renowned author, editor, and publisher, is a man who doesn't mince words.

In a recent editorial column commenting on crime and capital punishment, Lucius penned this opinion:

> . . . A nice point for the consideration of social ethics would be the possible execution of lawyers knowingly engaged in the defense of persons found guilty of murder. In most communities, the accessory to the crime of murder, the lookout, the gun carrier, the active participant at whatever degree removed, is considered equally guilty with the principal participant in the crime. Is a lawyer who defends a man he knows to be guilty of murder and so allies himself against society itself not an accessory after the fact? Is not a proven false witness in the defense of a murderer an accessory . . . ?

You have forgotten, sir, that our law provides that every man is presumed to be innocent until the contrary is proved to a moral certainty and beyond a reasonable doubt.

Mr. Beebe is a gentleman and a scholar, but for all his education he has apparently never come across a basic principle: The trial lawyer does not defend the charge, he defends the man.

Who can evaluate how or why the mental wheels, in their turning, generate the spark resulting in the annihilation of a human being? It is easy to condemn. But who among us can dismantle the mechanism of man's mind and explain the hidden and powerful compulsive drive of the murderer? Could it be that civilization itself creates a killer? This is a question that cannot be answered with denial or affirmation; it is unanswerable.

While some effort has been made to rid it of its worst absurd-





ities, law has advanced little since the days of William Blackstone. If medicine had remained as backward, the chief remedial aid of today's doctor would be bloodletting.

Man aims gropingly for perfection, but owing to ignorance, prejudice, weakness, disease, passion, or the complexities of the world, he often produces near disaster for himself and for others. In attempting to explain criminal behavior, man is faced with a network of facts so minute that his lack of understanding must always far outweigh his knowledge and his judgment.

We cannot help the hereditary dispositions with which we are equipped, nor can we help the environment into which we are born. How can we be reproached for any action if we cannot be reproached for any of the factors which have determined it? Some are born with mental and physical strength; others are mentally or physically handicapped. Some are born rich and need not concern themselves with earning a living; some fight for existence day by day. Some have fine intellect and some are idiots. Some have the capacity to learn; others cannot absorb elementary problems or meet them.

Man is a strange animal; he loves to punish. There is the attitude that the aim of punishment is to be measured in terms of its benefits to society. Punishment is used not only to induce the person punished to abide once more by the law, but also to hold up to the members of society generally the need for obedience to the law. In the sphere of religion, there is the doctrine of predestination, which declares that some have been chosen by God from everlasting to enjoy salvation, while others are doomed.

Since the Law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to get in the streets, and to steal bread, it is not strange that the murder trial is the most interesting of the conflicts between man and the state. The public enjoys the murder trial and its aura of mystery, for strangely, many good people, nice people, law-abiding people topple from the emotional plateau and kill.

Murder is a seed in man's soul nurtured by negative emotions —from fear and hatred, from anger and anxiety, from jealousy and greed, from humiliation and spite, from repression and resentment. The seed bears fruit only in rare instances, sprouting only when conscience or consciousness have abandoned man's mind.

The public finds emotional outlet for its own soul-bound seed in following the daily outbursts of others. There is magic in murder.

The role of the lawyer in such circumstances is seemingly difficult to comprehend for such as Lucius Beebe. The Law is established for all men, the lawyer for those who seek him out. In any court, criminal or civil, the lawyer supports his client only within the limits prescribed by personal and professional ethics. He is neither the judge nor the jury, with the obligation of determining right or wrong, guilt or innocence. His function is merely to present his client's case.

If a lawyer refuses to defend, either from what he may think of the defendant, the charge, or the offense, he assumes the position of judge and jury even before the hour of judgment and, in proportion to his rank and reputation, puts heavy influence or perhaps a mistaken opinion into the scale against the accused.

Can anyone question that it is better for our civilization that a hundred guilty persons should escape the punishment of death than one innocent person should be executed? A man must be given the opportunity to present his defense. Even God did not pass judgment upon Adam before allowing him to present his defense. *Adam* (said God) *hast thou eaten of the tree whereof I commanded thee that thou shouldest not eat?*

# Does the Punishment Fit the Crime?

# NIGGER JACK

THE HISTORY of capital punishment indicates man has been put to death by his fellow man in a variety of ways. Hanging has been the most popular mode, but executioners have never relied solely on the noose. On occasion the convicted has been shot, starved, drowned, electrocuted, gassed, poisoned, crucified, guillotined, stoned, or burned at the stake.

Despite a suggestion of acceptance in the Old Testament, burning became too closely associated with the deaths of religious martyrs and lost favor in the western world. It can be supposed some credit for such feeling is due England's Queen Mary I, who put to the torch three hundred stubborn Protestants. Following her reign, the legal burning of a human being was an infrequent occurrence.

But while such method of execution was practically nonexistent, the statutes which allowed it were not always stricken from the tomes of justice. In South Carolina, as late as 1825, an inferior court of two magistrates and five freeholders tried a man called Nigger Jack for the double crime of rape and murder. Deciding to make of Nigger Jack a dreadful example, the court sentenced him to be chained to a stake, soaked in turpentine, and burned alive.

The story of Nigger Jack is preserved in the Miscellaneous Records of South Carolina. As a historical document, the statement of account from the constable to the state treasurer for services rendered is evidence of the executioner's impassiveness concerning his duties.

| | |
|---|---|
| DUE Thomas Goodman, Constable: | |
| To Summons five freeholders at 54 | 2.70 |
| To Summons one Magistrate | .54 |
| Guarding of Nigger Jack four days & nights at 1.50 | 6.00 |
| Feeding Nigger Jack four days | .50 |
| Two waggons & teams one day a-getting of lightwood for to burn Jack | 6.00 |
| Four hands one day extra of the driving for the waggons | 2.00 |
| Paid Black Smyth for ironing of Jack | 2.50 |
| Two bottles of Spirits Turpentine at 56–1/4 | 1.12–1/2 |
| Chains for to confine Jack when burnt | 3.00 |
| Executing of Nigger Jack | 3.00 |
| | 27.36–1/2 |

South Carolina
Abbeville District

I John C. McGhee one of the Justices of the peace for Abbeville District hereby Certify that Thomas Goodman is a constable for this District Regularly appointed, that I believe the charges in the above account are just and reasonable.

22nd Nov. 1825 JOHN C. MCGHEE, J. P.

The law was changed. The South Carolina legislature amended the slave code of the state to read: On the conviction of a slave or free person of color for a capital offense, the punishment shall be by hanging and not otherwise.

But Nigger Jack burned.

# IT'S THE LAW—BUT DON'T YOU BELIEVE IT

UNITED STATES SENATOR John L. McClellan of Arkansas has written a book—*Crime Without Punishment*. In it he has given the reader a report on the work of his committee. McClellan's years of experience in both the House and Senate have fitted him well for the chairmanship of the Rackets Committee of the United States Senate. The book is a great record of trial without benefit of defense.

McClellan is a determined man. After his election to Congress in 1938, he ran against Mrs. Hattie Caraway for the Senate. He was defeated. He tried again in 1942 and won, and is now serving his fourth term as United States Senator.

The Senator's book is a review of the testimony given in the many cases investigated by his committee, and sets forth some of the more important aspects of the evidence on the alleged improper activities of Labor and Management alike. Of course, no one appearing before the Senator's committee had a lawyer to advise what course to follow.

The Spanish Inquisition spilled more blood it is true, but these congressional committees have ruined more families without one thought concerning their constitutional rights. This is something new in America. We fought against England because of the Star Chamber proceedings which destroyed men without benefit of trial by jury, but now we have opened the doors wide for congressional committees to run wild and to destroy man without benefit of the right to a defense—right or wrong.

The only important chapter in the Senator's book is titled "I Decline to Answer"—and here the Senator gives us his

thoughts about the Fifth Amendment to our Constitution. He writes that about 22 per cent of the witnesses who appeared before the committee took the Fifth Amendment. The Senator does not approve of the use of the Fifth because, as he says, "many of the witnesses would tell only their names and addresses and would then decline to answer any further questions . . . many of these un-cooperative ones were obviously attempting to hinder and obstruct the Committee in its efforts to get at the truth, more so than they were seeking to protect themselves against self-incrimination. . . ."

The Senator, in attempting to justify his destruction of the rights guaranteed by the Fifth, is blind to the fact that this amendment is part of our United States Constitution. The words mean what they say: "*. . . nor shall be compelled in any criminal case to be a witness against himself. . . .*" The United States Supreme Court through the years has ruled that even in civil cases a witness may refuse to answer any question his answer to which might be used against him in any criminal proceeding.

I disagree with the Senator and his thinking. While the Fifth has protected some criminals, it also protects the innocent. I am informed the Senator is a lawyer. I ask him what would be his advice to his client if he were for the defense; if he were alone fighting for some man who had faith in him and in his judgment.

The Senator writes that "most of our citizens have little to do with Congressional hearings and with courts and judicial proceedings, and therefore they do not always have a clear understanding of the Fifth Amendment, nor do they know its wording, its history, and the broad concept of freedom and justice that it projects. . . ." Well, Senator, it is time that you took notice of the broad concept of freedom and justice the Fifth Amendment guarantees to all men.

The Senator continues:

> . . . the Amendment was submitted to the people with nine other Amendments at the first session of the first Congress to convene under the new Constitution (all of the ten were adopted and



> came into effect on December 15, 1791). Its provisions go to the heart of Anglo-Saxon justice as it developed in Britain during centuries of struggle by brave men against their oppressive rulers —rulers who grossly misused the great powers of nobility and government which they possessed. Its ideals crossed the seas with our ancestors who settled this land, and the principles it declares and vouchsafes to us are now an integral part of our heritage. Its safeguards are the proud possession of free men—they were designed and developed to protect freedom. . . .

I agree with Senator McClellan that the language has a splendid dignity, and I point out to him that its meanings are as clear and appropriate today as they were in 1791. This nation stands in glory upon its Constitution. The efficacy and grandeur of that sacred document should be, by resolute purpose and dedication, steadfastly strengthened and preserved, and not whittled or hacked away by expedient interpretation of congressional committees seeking publicity or by reckless tinkering and irreverence.

These fourteen words, "*nor shall be compelled in any criminal case to be a witness against himself*," mean exactly what they say. If we as a nation believe their usefulness at an end, then let us lawfully abolish the Fifth by amending the Constitution of the United States.

Individual liberties in America are declining, in the view of Associate Justice William O. Douglas of the Supreme Court. Expanding on a theme he developed in a recent booklet, *Freedom of the Mind*, Justice Douglas cited these examples in a TV interview.

The Fifth Amendment "has become a slur" because of improper conduct of congressional investigations. "The Fifth Amendment is one of the greatest heritages we have. . . . It was designed to protect the innocent as well as the guilty. The design was to make Government produce evidence . . . rather than putting a man or a woman on the rack and squeezing out of him or her the stuff to convict them. . . ."

I pray God that someday—*soon*—we will hear voice after voice

of the American people reiterating Mr. Justice Douglas. Perhaps if we keep the right thought, even McClellan may become a worker in the field of law and not the inquisitor who is destroying our heritage of liberty. The Senator may become a convert to a religious belief in our Constitution and in the rights of man. But, I say "may"—only God knows and he doesn't talk to McClellan.

Every judge, every lawyer, and every citizen must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment, nor dare anyone permit any inference of wrongdoing to flow from the invocation of a constitutional right.

I do not argue the cause of law violation, but I shall fight to the death for the rights my forefathers bled and died for. If this be wrong, my license to practice law and that of every other lawyer should be taken away . . . including your license, Senator.

## ORGANIZED CRIME

I HAVE JUST CONCLUDED reading a book on organized crime. Some of us who have tried criminal cases and are interested in the cause of crime do not find, from either observation or experience, the fearful amount of organized crime that our investigating committees would have us believe exist.

The Committee on Mercenary Crime of the American Bar Association reported some thirty years ago that "the gangster flourishes because of the conditions, laws, and customs which make his business profitable, and because of a large popular demand for the products of his illegal business." He will doubtless continue to flourish as long as crime continues to pay such



large dividends and there is such a remarkable demand for his wares.

We, the people, demand that some so-called organized crime exist and flourish to the profit of certain groups, organized or unorganized. The clearest example, and the one nearest to us all, is the horse-race bookie, who is found in every city and hamlet. Look carefully at this organized crime. Here is what is really happening, the late Senator Estes Kefauver to the contrary notwithstanding.

Horse racing is legal in many states. We permit citizens of all walks of life to attend race tracks and bet their fool heads off. This is lawful. From the bottom of our society straight to the top, no one is molested, degraded, or called a criminal so long as he bets at the race track. Of course, he must have the time to go to the track.

There are others of our citizens who also enjoy the thrill of a bet on a race horse but cannot take the time to go to the track, and so you have the bookie around the corner who will take a bet and absorb it if the bettor loses, or pay track odds if the bettor wins. This bookie is a criminal. The person betting with the bookie is also a criminal because he and the bookie have conspired to violate the law which specifically provides that you can bet all you please at the track but not elsewhere.

Now go a step further. The bettor wants to bet on a horse running at a Florida or New York track but unfortunately cannot travel to these tracks, so he places his bet with the bookie. Having made this wager he wants to be sure that he will not be cheated if he wins, so he buys, the pure, moralistic, holier-than-thou morning or afternoon papers to read the race results from those far-off places. There is a whole page given to this important information. The newspapers, on this page, recommend which horses to bet on, and boast daily on their exactness in picking winners. In addition there are newspapers given over entirely to race track results and to race horses. These papers are transmitted by our holy Post Office Department and distributed over all the United States.

The people telegraphing this information to the newspapers also make it available to the bookie. All this to fill the demand of our citizens.

Yet another thing. If you are just inside the wire fence of the race track and place a bet, it is all pure and legal. If you do the same thing six inches away, but outside the wire fence, you have become an aider and abettor of organized crime. Who is kidding whom?

You can't legislate against man's will.

## IN THE MIDST OF LIFE . . .

THE LATE ERNEST HEMINGWAY once wrote of "men dying well." I have seen men die and none of them did it well. At best a man is felled swiftly and is denied the months of agony that many victims of slow and insidious terminal illnesses are forced to bear.

But of all who die, perhaps it is hardest for those who die as a result of no accident, no prolonged illness. Perhaps it is hardest for those to die who know, months in advance, the day and hour they will be killed.

Even Hemingway, had he been compelled to witness a state-sponsored murder, might have rewritten his lines about men dying well.

Our whole life is a sort of training period for the business of dying, much as maneuvers are a training period for a soldier who will someday face combat. Like the soldier, none of us can tell how we will react when the warm summer of maneuvers has passed and we are left to stand alone and frightened in a barren country, about to face an enemy we have never met.

I have received a letter from a man who is in training to die.



This man wrote me from condemned row, San Quentin State Prison. I do not know this man, nor can I truly imagine what was going on inside his head as the date of his execution approached. I cannot imagine his thoughts or his feelings as he watched others being led from their pens, down the corridor, never to return.

I cannot imagine this man's torment on the day when impassive guards will come for him and bear him to the lethal gas chamber where, in compliance with the will of the People of the State of California, the executioner will cause lethal hydrocyanic gas to choke the life out of him.

This man's letter speaks for itself. It is a letter from a man possessed of a subtle terror. It is a letter from a man who does not want to die, who is pleading for his life in the only way he knows.

In his place, what kind of a letter would you write?

MY DEAR MR. EHRLICH:

I am in a predicament that forces me to look forward to having that pill of Cyanide dropped, with me as its victim. The most harrowing aspects of the predicament is the fact that I am innocent of the crime which I am accused of– The crime: MURDER; killing a police officer, which at the time was performing his duty. The co-defendant in this case has confessed to the killing, implicating me by stating the initial shot, the shot that supposedly killed the officer, was fired by himself, and further stated that I too fired shots into the officer's body.

The facts are contrary to those statements signed by the co-defendant in this case.

I am certain that your knowledge of how the people, in their clammoring for justice, force the prosecution to extract blood for blood! And, as in all cases concerning the death of a police officer, the more blood, the better. Picture, if you will, just how much consideration my word will receive in denying the allegations set forth by the co-defendant!

I cannot help but feel that the co-defendant and the prosecution are conspiring to take my life. My situation is so complicated that only the best legal mind in the country can possibly save my life. . . .

I admit to being a thief, a social outcast, and immoral according to the standards of the people, but I am not a murderer and abhor violence in any form.

What I am asking you to do, Mr. Ehrlich, is save my life.

No one knows where the true balance of justice lies, and the laws of Polarity have always puzzled my mind. Good and evil, right or wrong, rich or poor, hungry and insatiated; what human being has the power to put all these seemingly contradictions in their proper perspective? If I am to die for a murder I did not commit, I would like to believe that it is the will of God, rather than that of the people . . . to distinguish the will of God from the will of the people is a purely personal thing, yet I feel certain that you will understand what I am trying so desperately to convey.

If you defend me, Mr. Ehrlich, and I am found guilty, then I will die peacefully and courageously. For then I will feel that God has redeemed a lost soul from a world of chaos and misery, otherwise I will feel that the forces of evil have, through the people, destroyed my soul, and will walk laughingly at the funeral, jeering at the dignity of innocence. One more life perhaps doesn't mean anything to the persons whose work consists of legally killing another person. Compassion for the condemned is something foreign to the principles that life has taught him in our society. But, knowing that your understanding transcends that of the average man, I believe that through various forms of abstractions that you know the value of life, that a human life is neither immaterial nor irrevelent; that no matter what his station in life may be, he also deserves to live.

Punishment by death is lawful, and I understand that it exists: to die for having committed a capital crime would never make me shrink under the hands of the executioner, for I well understand the intricate implications involving crime and its punishments. But, to die for something that I am innocent of, even though the possibility exists, is not my idea of propriety.

God does not endow men with exceptional gifts unless he has chosen to use them as an instrument of his benevolence . . . I hope and pray that you recognize this urgent need and decide that this life too is worthy of his grace. God is not a respector of persons only, but through one righteous soul he bringeth forth good fruits of abundance upon the multitudes . . . So, in essence, though I knowingly will benefit from it, it is not just myself who will reap the bounty of your understanding.



With death seeming so imminent, it turns the vision inward; I have stripped my soul to nakedness—I do not like what I see. The truth is not very pleasant, except for the fact that I have learned the truth about myself. But, one fact still must remain; I am not a murderer and should not have to face the possibility of dieing as one!

With overwhelming humility and preponderance of humbleness, I pray that you have enough compassion to save an innocent man's life so as to give him the opportunity to save his soul.

Respectfully,

## ENTRAPMENT

THE LIBRARIES of our scholarly nation are stocked with countless treatises dealing with the hows, whys, and wherefores of the criminal mind.

The subject is as popular as motherhood and patriotism. Philosophers and historians, policemen and prosecutors, theologians and lawyers, social workers and psychiatrists—all have sought to explain the mental make-up of the criminal as though he were a mathematical problem subject to exact proof.

Possibly there has been too academic an approach to the subject.

Not so long ago a criminal was born. It wasn't immediately apparent. He was an obedient and respectful child and emerged into adulthood a seemingly honest and trustworthy member of society.

When employment beckoned he did not balk; in fact he chose to become a policeman, assuming the duty of protecting his fellow citizen and his community.

On the surface he was a God-fearing man. He attended church regularly, and upon entering or leaving the place of worship his uppermost thought was the welfare of his brethren.

Despite his background, his honest purpose in life, his desire to be a model member of mankind, he left the straight and narrow path of lawful life and entered the hall of crime.

He was a member of a large Police Department in a metropolis in that portion of our nation known as the East. The department itself was no better, no worse than most.

On a particular day a well-known gangster was given his just desserts through a shotgun employed by a fellow hoodlum. When considerable time had elapsed and the killing remained unsolved, the citizenry, goaded by the press, demanded a reform in the Police Department.

Our hero, and his fellow bluecoats, responded by launching an intensive crackdown on crime of all sorts, but mostly misdemeanors, violating obscure, long-ignored, microscopically minor city ordinances.

In his pursut of righteousness the officer learned a certain grocery delivery boy was carrying a supply of tobacco on his motorbike, for the convenience of his customers, and was dispensing cigars and cigarettes without the benefit of a city license, thus violating an ordinance that had been on the books for more than a century. The act was obviously a most heinous offense, and the officer made plans to trap this public enemy.

The plot came to the attention of an old-timer on the force. Being a sympathetic sort, and wise in the ways of the world, he tipped off the grocery boy and had him hustle down to City Hall and obtain a tobacco permit.

On the day following, our police officer hailed the youth and asked to purchase a package of cigarettes.

"All out," answered the boy, "but I got cigars."

"Okay, give me a cigar," said the policeman.

"Only sell them in boxes. Ten dollars a box," said the boy.

Eager to reduce the crime rate, the officer handed over ten dollars, and immediately demanded to see the boy's tobacco license.

"Right here," said the youth, pulling the permit from a pocket



and leaving our officer, who himself didn't smoke, with a box of unwanted cigars.

Then the officer had an idea. "You're a good lad. How about buying them back?"

"Sure," said the boy, "for five bucks."

The policeman was almost apoplectic with the knowledge that he had been had, but made the exchange anyway.

Whereupon the boy rode straight to the office of the district attorney and swore out a complaint against the officer.

The charge: Selling tobacco without a license.

## CRUEL AND UNUSUAL PUNISHMENT

THE EIGHTEENTH CENTURY in England was hardly an age of enlightenment in the field of punishment for crime. The list of felonies had been greatly enlarged by statute and every felony was punishable by death. Pressing to death—the *peine forte et dure*—was not abolished until 1772, nor was burning at the stake, as a punishment for women convicted of petty treason—killing a husband—until 1790.

Flogging in the British military and naval services was carried to such barbarous extremes that its execution, while savage in its cruelty to the subject, was demoralizing to those who inflicted and who witnessed it. Judged by contemporary British standards, the Continental Army's limiting of corporal punishment to one hundred lashes may be viewed as indeed humane. A proposal to raise this limitation to five hundred lashes was rejected by Congress in 1781. One hundred lashes was the Navy maximum.

In the American Army, desertion was at first a capital offense. Not until 1830 was it made noncapital in time of peace; and

soldiers were regularly executed for deserting. Sometimes death sentences were commuted, but this was rare.

In a letter from a Colonel Hamtrack to the Commanding General, December 5, 1794, on soldiers convicted of larceny, the colonel writes, ". . . I have flogged them till I am tired. The economic allowance of one hundred lashes allowed by government, does not appear a sufficient inducement for a rascal to act the part of an honest man. . . ."

Years ago the U.S. Army directed that whenever ball-and-chain is imposed as the sentence it should state the weight of the ball, the length of the chain, and how it is to be attached. In practice, the military court generally fixed the weight of the ball at from six to forty pounds—most frequently, perhaps, twenty-four—and the length of the chain from three to six feet, and specified that the latter should be attached sometimes to the right leg or ankle and sometimes to the left. In an early instance, a part of the sentence read: ". . . to wear a ball and chain attached to his neck for two weeks."

This punishment, though very frequently imposed in the earlier days of our history, was later by direction of the Judge Advocate General not a penalty to be resorted to except in aggravated cases, and was usually remitted except where the offender was shown to be a violent person, or where attempts to escape were to be expected and he could not otherwise be secured.

In the early English Articles and the contemporary German Code of Gustavus Adolphus there is worse prescribed as sundry punishments, such as decimation—where regiments were discerned in misbehavior before the enemy; beheading; being drawn and quartered in connection with the death penalty; being drowned or buried, bound to the person killed, in punishment for homicide; having the tongue perforated with a red-hot iron for blasphemy; losing the right hand; losing an ear; being dunked in the sea; and having to perform the duty of scavenger.

Our original Military Code of 1775 enumerates the punishments authorized to be imposed by courts-martial—whipping, not exceeding thirty-nine lashes; and certain offenses were declared punishable with not less than fifteen or twenty, nor more than thirty-nine, lashes.



In 1790 public whipping was authorized by statute as punishment for sundry civil offenses such as larceny, embezzlement, etc., the limit being fixed at thirty-nine stripes, and by statute in 1799, forty lashes for robbing the mail. It was finally abolished as a punishment for civil offenses by an Act of Congress in 1839.

The Military Code of 1806 fixed the maximum of this punishment at fifty lashes; but a few years later, Congress repealed this provision, and whipping or flogging was done away with. Later, however, in 1833, this form of discipline was revived for deserters. At length, at the beginning of the Civil War, by an 1861 statute, flogging as a punishment in the Army was abolished.

Flogging came into disrepute because this punishment had failed, due in great part to the fact that in the British service it was carried to a brutal and perilous extreme. Five hundred lashes was not an uncommon sentence; one thousand were imposed in repeated recorded cases; and fifteen hundred and even two thousand were sometimes reached.

The offender being secured in an unnatural position, the lashes were applied by an enlisted man . . . right-and-left-handed drummer being preferred . . . with the . . . cat . . . its thongs sometimes steeped in brine or salt and water . . . upon the bare back and shoulders, which soon became flayed and raw. The victim was not relieved till the surgeon pronounced that he had endured as much as could safely be inflicted for the time. He was then removed to the hospital, to be brought out again, when his wounds were partially healed, for a second installment of the punishment, and this process was repeated till the whole number of lashes had been administered. The sufferer, however, sometimes perished under the blows, or in consequence of the injuries received, before the law had been fully vindicated.

In the American service, after the Revolution, comparatively

few sentences of flogging were adjudged until after the punishment had been revived for deserters in 1833, when it was frequently resorted to, especially during the period of the Mexican War.

An instance of a sentence approved, of fifty lashes, is found in a general order in 1861 and in February, 1862—the last case of the kind that I have discovered.

Marking of deserters with the letter *D* dates from the Roman law. This also was authorized by the British Mutiny Act, under which the offenders were marked with the letters *B. C.*—bad character—if discharged with ignominy.

In our service this punishment has been carried considerably further, additional forms of it having been sanctioned by usage. Soldiers have been sentenced to be branded, as well as marked, with *D*, both for desertion and for drunkenness. The mark was commonly on the hip, but sentences to be branded on the cheek and on the forehead have been adjudged and carried out. Other markings imposed by our courts-martial have been *H. D.*, for habitual drunkard, *M*, for mutineer, *W*, for worthlessness, *C*, for cowardice, *I*, for insubordination, *R*, for robbery, *T*, for thief.

Sometimes, also, entire words were marked, such as *Deserter*, *Habitual Drunkard*, and *Mutineer*, or *Swindler*. The branding was done with a hand iron; the marking with India ink or gunpowder, usually pricked into the skin or tattooed. Congress ultimately prohibited such punishment.

Among the more unusual punishments was the carrying of weights, which consisted mostly in marching for a certain time in front of the guardhouse or on the parade ground carrying a knapsack loaded with brick, sand, or other articles, weighing from twenty-five to thirty pounds.

Some of our easier and lighter penalties were standing or marching for a certain time and bearing a placard or label inscribed with the name of the offense, such as DESERTER, COWARD, MUTINEER, MARAUDER, PILLAGER, THIEF, or HABITUAL DRUNKARD. In some cases the inscriptions were more extended, such as DESERTER, SKULKED THROUGH THIS WAR; CHICKEN-THIEF; FOR SELLING LIQUOR TO RECRUITS; I FORGED LIQUOR ORDERS; I PRESENTED A FORGED ORDER FOR LIQUOR AND GOT CAUGHT AT IT; I STRUCK A NON-COMMISSIONED OFFICER; I ROBBED THE MAIL.



Soldiers have been sentenced, for minor offenses, to stand on the head of a barrel for certain periods, sometimes also bearing a placard. Another punishment with the use of a barrel was for a soldier to carry a barrel with his head through a hole in one end, the barrel resting on his shoulders.

Less usual were such punishments as riding the wooden horse . . . sometimes with hands tied behind the person, or a musket tied to each foot; wearing a wooden jacket; wearing an iron collar or yoke; marching with coat turned wrong side out; being tarred and feathered; the pillory; the stocks; being gagged; being tied up by the thumbs.

But none of this today. We have become civilized and humane. We put a man in solitary confinement on bread and water for month after month. We make him compress himself into a coffin-sized box for months on end. We sometimes have mercy and either gas him, hang him, or shoot him. You will agree that we have progressed.

# Lawyers, Judges, and Juries

# ARE LAWYERS NECESSARY?

IF HENRY III had had his way the ancient profession known as the Law might have withered and died during his fifty-six years as ruler of England.

King Henry distrusted lawyers and feared their knowledge. He knew of their popularity among the commoners. Possibly he saw them as a threat to his shaky status as monarch.

Whatever the reason, his feelings became evident when he banished schools of law from the City of London.

Lawyers, however, are a hardy lot, and King Henry's edict amounted to little more than an inconvenience. Teaching was transferred to the banks of the Thames and the schools turned out more fledgling barristers than before.

Little has changed in the seven hundred years that have followed the reign of Henry III. Among the ruling class there is still a distrust of lawyers. The common man still looks with awe and admiration at the attorney who counsels him. And schools of law continue to discharge new practitioners in ever-increasing numbers.

Joseph Hodges Choate was as well known for his oratory at the banquet table as he was for his oratory in the courtroom. In 1880 he was invited to address the New York State Chamber of Commerce. After a flattering introduction Choate spoke these words:

> I rise with unprecedented embarrassment in this presence and at this hour to respond to this sentiment, so flattering to the feelings of all the members of the Bench and Bar, to say nothing

of that shrinking modesty inherent in the breast of every lawyer and which the longer he practices seems to grow stronger and stronger.

At an hour like this, merchants like witnesses are to be weighed as well as counted. And when I compare your appearance at this moment with what it was when you entered this room, when I look around upon these swollen girths and these expanded countenances, when I see that each individual member of the Chamber has increased his avoirdupois by at least ten pounds since he took his seat at the table, why, the total weight of the aggregate body must be startling indeed, and as I suppose you believe in the resurrection from this long session, as you undoubtably hope to rise again from these chairs, to which you have been glued so long, I should be the last person to add a feather's weight to what has been so heavily heaped upon you.

Mr. Blaine, freighted with wisdom from the floor of the State House and from long study of American institutions, has deplored the low condition of the carrying trade. Now for our part, as representing one of the institutions which does its full share of the carrying trade. I repudiate the idea. We undoubtably are still prepared to carry all that can be heaped upon us.

Lord Bacon, who was thought the greatest lawyer of his age, has said that every man owes a duty to his profession; but I think that can be amended by saying, in reference to the law, that every man in the community owes a duty to our profession; and somewhere, at some time, somewhere between the cradle and the grave, he must acknowledge the liability and pay the debt. Why, gentlemen, you cannot live without the lawyers, and certainly you cannot die without them.

It was one of the brightest members of the profession, you remember, who had taken his passage for Europe to spend his summer vacation on the other side, and failed to go; and when called upon for an explanation, he said—why, yes, he had taken his passage, and had intended to go, but one of his rich clients died, and he was afraid if he had gone across the Atlantic, the heirs would have got all of the property.

When I look around me in this solid body of merchants, all this heaped-up and idle capital, all these great representatives of immense railroad, steamship and other interests under the face of the sun, I believe that the fortunes of the Bar are yet at their beginning.

Gentlemen, the future is all before us. We have no sympathy with communism, but like Communists we have everything to gain and nothing to lose.

The Chamber offered no rebuttal.



# THE CRIMINAL TRIAL LAWYER AND THE ADMINISTRATION OF JUSTICE

THE CITIZENS OF OUR COUNTRY would not adopt the Constitution of the United States until a series of amendments were added which have for their purpose the protection of the rights of the people in those areas where individual liberties are concerned. Of the ten amendments adopted, three stand perpetual guard: the Fourth, Fifth, and Sixth.

The Fourth Amendment guarantees that the people be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, and further that no warrant shall issue but upon probable cause supported by oath or affirmation.

The Fifth Amendment provides that no civilian shall be held to answer for a capital or otherwise infamous crime unless upon presentment or indictment of the Grand Jury, nor that any person for the same offense be twice put in jeopardy of life or limb, nor that any person shall be compelled in any criminal case to be a witness against himself, nor that any person be deprived of life, liberty, or property without due process of law.

The Sixth Amendment provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury, and that the person be first confronted with any witnesses against him, and that he have the assistance of counsel for his defense.

To guarantee that these rights be accorded to all men, the

criminal trial lawyer stands as guardian and defender. Without him, these rights would be nonexistent and unenforceable.

As a nation, we pride ourselves that no one, whatever the crime, can be compelled to stand trial in an American court without a lawyer to aid him in his defense.

This man who stands beside the defendant is commonly called a criminal lawyer, and those living in ivory towers, as well as the moral hypocrite, look upon him as a professional outcast. It perhaps has never occurred to them, nor to some of our holier-than-thou citizens, that a man's life or liberty is more important than his money.

We have always provided men who are willing to defend those accused of crime, no matter how offensive or terrible the crime. More often than not the only reward received by the criminal trial lawyer is the satisfaction that he has rendered a service not only to the individual defendant, but to every man.

While our law schools pay little, if any, attention to criminal law, and while they spend very little time teaching this important subject, it is heart-warming and assuring to know that the criminal lawyer himself has rededicated his profession to the service and the protection of his fellow man.

Great men in our history have thrown away the fears of our legal fraternity and have involved themselves with the most explosive cases of our time. These lawyers courageously accepted the unpopular case, knowing all too well that in so doing they faced a very real threat, a financial loss, social ostracism, and political extinction.

Hamilton in his defense of John Peter Zenger in 1735 anticipated our First Amendment and guaranteed the freedom of the press. In 1770 John Adams, who was to become our second President, volunteered to defend the soldiers in the historic Boston Massacre, and this at a time when the British were the most unpopular of all humans on this continent.

In 1846 Wiliam Henry Seward defended William Freeman, a demented Negro whose civil rights were in grave danger of being violated by a bestial and frightened community. It was



William Henry Seward who on January 1, 1863, brought to Lincoln for his signature the Emancipation Proclamation, in which the President said, "I do order and declare that all persons held as slaves are and henceforth shall be free," and thus this same lawyer, Seward, seventeen years earlier had decided for himself that slavery ought not to exist and anticipated the Thirteenth Amendment.

There are so many examples of the moral and mental courage shown by lawyers in the defense of the rights of the people that to enumerate each case would fill volumes.

The criminal trial lawyer renders services which cannot be lowered into the class of civil litigation. To him life or liberty is the pawn; to the civil trial lawyer the issue is always the entries in the ledgers of accountants.

It wasn't too long ago that Judge Charles W. Fricke appointed the late Jack Hardy, a great criminal lawyer, who had entered the judge's court that morning on other business, to defend the notorious Barbara Graham.

Jack Hardy stopped everything and went to work on the defense. He spent months and much money in the defense. He permitted his own business to stagnate. He later applied for a five-thousand-dollar fee and a grateful community paid him nothing. Today, at last, a court may order lawyers' fees paid when they are conscripted for this service.

It is the defense lawyer—the criminal trial lawyer—who day in and day out labors to help those against whom evidence has been obtained illegally; he fights against illegal and unreasonable searches and seizures; he fights to secure every right for the citizen which is guaranteed him by the Constitution and its amendments.

Before our government was created, a defendant had to prove himself innocent, instead of its being the duty of the prosecution to prove his guilt to a moral certainty and beyond a reasonable doubt. How would you enjoy living in such a society and under such government?

It is the criminal lawyer who insists that the citizen be un-

molested in the accomplishment of his duties and obligations. It is the criminal trial lawyer who has made it possible for me to write this article. Without him, I would have feared the consequences of an enraged authority.

It is the criminal trial lawyer who stands guard while from the houses of worship are heard the words of the Holy Scriptures: "But as for thee, stand here by me, and I will speak unto thee all the commandments . . . that they may do them. . . ."

Thank your God that there is such a defender of the rights of man.

## JUSTICE DISPENSED WITH HERE

LET US TAKE a brief trip, down the street and into the corner drugstore. Further, let us assume we have a chronic heart condition and we are headed, as rapidly as possible, to purchase some medicine for this heart condition. Now, to really give this little scene some meaning, let us assume that if we do not get the right medicine it may cost us our lives.

We arrive in the drugstore; it is empty. The druggist is gone, the counter is bare. Our breath quickens; we are in a great hurry. With trembling fingers we unwrap the prescription form the doctor has given us and try and make some sense of the writing on the form. No use; the symbols are meaningless. Without the druggist, we are lost.

Enter two young gentlemen, neatly dressed, carrying brief cases. They engage us in conversation, learn of our plight. Nothing easier, they tell us as they study the prescription form; they know how to fill the order and send us on our way, our heart



again beating regularly. Both of these young men go behind the counter and don druggists' gowns. But at this point, something goes wrong; the two men begin bickering over just what the prescription means. One maintains that the medicine contains ten grains of a thing and the other says that such a dosage would surely kill the patient.

We stand on our side of the counter, watching these two young men. They approach us and argue the merits of their respective cases. We are confused, knowing little or nothing of pharmacology. And to compound our confusion, we must make a decision, for it is time to take the medicine. What will we do? Whom will we trust?

This little vignette could, and often does, illustrate the plight of the trial judge during any particular case that is before him. He is daily being confronted by two attorneys, each with a different viewpoint, each trying to sell him—along with the jury, should one be present—on the particular merits of the "heart medicine" that is at issue. The judge must often pick a particular brand of medicine, and make a decision. Often he knows no more about the validity of this decision than you or I, if we were called upon to choose a prescription down at the corner pharmacy.

What is a judge? Well, unless he is a member of either our highest or our most modest level of the judiciary—the State Supreme Court or the local justice of the peace—the law requires that he be a lawyer. Many of our judges have years of practical trial experience behind them before they go to the bench, and they have learned much of the law; others, with as many years' experience, have not learned much more than the rudiments.

Like medicine, judges come in a multitude of sizes and shapes, and have as many individual characteristics. Some of these gentlemen are harsh, captious, and are quick to convict. Many of these persons have a special peeve, often limited to a certain kind of crime, and woe unto him who appears before the judge who, say, has an especial loathing for wife beaters.

Many of these judges may have worked for years in the district attorney's office prior to donning the black robes and they have never quite gotten over their prosecution orientation, silently (and sometimes not so silently) rooting for the prosecution during every criminal action that is brought before them.

Other judges tend to be as sympathetic with the defense, as the law—and the skill of defense counsel—may allow. Perhaps some of these judges, themselves, have worked for the district attorney in the past and, instead of becoming embittered, have come to understand that no two cases are alike, and it could be that the man standing before him, accused of beating his wife, hit her because she was chasing him with a butcher knife.

The judge mounts the bench with any or all of the problems that beset the average man in the street, if such a creature may be said to exist. Perhaps the learned judge listens to a case, his mind distracted with the knowledge that his wife must undergo an operation a half hour thence. Another jurist may suffer terribly from arthritis and it will be his job to try and keep his face as free of grimaces and expressions of pain as possible, as he referees the proceedings before him.

It goes without saying that a judge must know the law, if nothing else. What kind of man he personally may be is a matter between him and his conscience. The best judges in our land will admit that they have not always been free of prejudice. This quality—prejudice—is as much a part of us as the very head that rests upon our shoulders. He who comes to me and says he is free of prejudice I immediately dismiss as being either a liar or a fool; in no instance would I want such a person sitting on the bench in a case I was trying. While I recognize that all of us have prejudice, I cannot abide by the man who tries to deny it. Prejudice is a heritage all of us must share for a few thousand more years; if we recognize it as such, we can do no more.

One of the hardest tasks that can confront a judge is that of having to make a ruling or a decision that he personally knows to be wrong. Many judges, for example, are compelled to send



a man to his death, themselves not believing for one moment in capital punishment. But if the jury has found a defendant in a murder trial guilty, and the law so dictates, the judge can do no more than pass a sentence that is harsh and unyielding. Such a judge may be heartsick for days after passing a death sentence and no one may realize it, such are the complexities of human nature. This may be a terribly difficult thing for some people to comprehend, this fact that many times the judge has no discretion in a case; the law he must support is not his, but the people's.

I think that the best qualification a man may have for becoming a judge is that he has heeded that old admonition: "Know thyself." While none of us were created perfect, the best we can do is to recognize our own imperfections; in so doing, we will be the more understanding of the imperfections we find in our fellows. None of us has led such a lily-white life that our dossier could stand to be scrutinized with the thought of criminal prosecution in mind. And for those who tell me they have committed no crimes during their brief time on earth, I say this: Your crime has been one of the gravest; you did not learn to know yourself and, as a result, you have never learned to know others.

Perhaps it is true that passing judgment upon others may be easier than passing judgment upon ourselves. While we may sometimes tend to rationalize our mistakes, our stupidity, our weakness, we still must arise each morning and stand before the bathroom mirror, if only for a moment, and see that which some call "the inner man." We sometimes spend restless and sleepless nights with the knowledge that we have sat in judgment on something we have done and we were compelled to find ourselves guilty.

As the best trial judges often have a kind of instinct for the direction justice lies in, we too have this instinct, at least as far as it applies to judging ourselves. We know when we have done a truly wrong thing and we do not need a lawbook to point out our crimes. Although some, like the judge in pain with arthritis, may not show the world the face of guilt, it is there, inside their

breast, and if it only comes out during the terror of a nightmare, it *has* come out. And will continue to come out for as long as such a person continues to deny that he or she was wrong, in one way or another.

When we judge ourselves, we have our conscience to suffer; when we judge others, we have *two* consciences to plague us, for we may have done two persons an injustice instead of only one.

Let us each be kind to the man who is passing judgment upon another; it may be his turn next.

## THE BAR OF JUSTICE

JURY DUTY, like the Olympic games, has come to require that participants be of amateur status.

There is no place in the jury box for a professional peer. The responsibility of sitting in judgment on your fellow man, whether it be in a civil or criminal case, is a matter of obligation, not a matter of choice.

A juror must take his place among the other eleven with a feeling of awe. He must weigh each point as if it were the heaviest burden in existence. He must reach a verdict only after careful consideration of the facts. And he must finally leave the courtroom thankful his servitude has ended.

There is little chance that professional jurors could come to be, under a democratic system of justice. No matter how a juror decides, he forever carries a courtroom label that tells the prosecution and defense his decision in the previous case. It is reasonable to assume that few prosecutors would pass a prospective juror who once voted for acquittal, or that the attorney



for the defense would not challenge a prospective juror who once had balloted guilty.

Further, jury duty, particularly during the period of deliberation, is an unpleasant task. It means separation from loved ones, poor pay, personal inconvenience, and confinement.

Under old English law, jurors were required to be kept without meat or drink, fire or candle, until they agreed.

Things are somewhat better today. The law directs that jurors be provided with suitable and sufficient food and lodging during their deliberations.

In 1880 in a California community, one Clarence Gray took objection to a political opinion offered by one Theodore Glancey. An argument flared into a quarrel climaxed by the discharge of a six-gun.

Theodore Glancey fell to the ground mortally wounded.

In due time, Gray was brought to trial. He contended the weapon went off by accident, but this defense was to no avail. The jury found him guilty of murder.

There is nothing unusual in the fact that the verdict was appealed. The decision of the Supreme Court of California is something else again.

The court was asked to judge the appeal on the basis of a motion charging misconduct of the jury, by which a fair and due consideration of the case was prevented.

The court, summing up its reasoning, ruled:

> . . . The jury was fully impaneled on the evening of the third of June. As soon as the jury was complete, they were, by order of the Court, placed in the charge of the Sheriff—instructed as to their duties, and thus remained in the charge of the Sheriff, not being allowed to separate until they were discharged on the morning of the twelfth. After the jury was complete, and before the cause was submitted to them on the afternoon of the eleventh of June, a period of about eight days, four five-gallon kegs of beer were brought into the room at the Tremont House, where the jury was kept by the Sheriff, of which about seventeen and a half gallons [of the beer] were drunk by them;

That during the same period some of the jurors drank claret wine, amounting to three bottles, at their meals, while some of them drank whiskey;

That all this drinking was done before the cause was submitted to them on the afternoon of the eleventh of June;

That on this day, during the noon recess, two of the jurors procured each a flask of whiskey;

That one of the jurors [Price, the foreman] drank nothing.

That all the drinking by the jurors was without the permission of the Court, or the consent of the defendant, or of the counsel engaged in the cause, and in fact without the knowledge of either of them;

That all the beer, wine and whiskey was procured by such of the jurors as desired it of their own motion and at their own expense.

Further, the evidence affords strong reason to suspect that one of the jurors drank so much while deliberating on the verdict as to unfit him for the proper discharge of his duty.

The decisions as to how far drinking by a juror while in the discharge of his duties as such, at his own expense, without the permission of the Court, or the consent of the party, is such misbehavior that the verdict should be set aside and a new trial granted, are not uniform.

When, in the course of the trial, a juror has in any way come under the influence of the party who afterwards has the verdict, or there is reason to suspect that he has drunk so much, at his own expense, as to unfit him for the proper discharge of his duty, or where he has so grossly misbehaved himself in any other respect as to show that he had no just sense of the responsibility of his station, the verdict ought not to stand.

The introduction of ardent spirits into the jury room while the jury were deliberating upon their verdict constituted misconduct per se. The Sheriff was authorized to provide the jury with suitable and sufficient food and lodging. This is a modification of the old rule which required that they should be kept without meat or drink, fire or candle, until they agreed.

It should be added here that if it is necessary that intoxicating liquors of any kind should be drunk by a juror, application for leave to do so should be made to the Court, who can make such allowances as will be proper. Jurors should not be allowed to judge for themselves in this matter. A defendant in a criminal case should not be called on to consent; and in any case where the party consents, if the juror becomes intoxicated, the verdict should not stand.

The purity and correctness of the verdict should be guarded in every way, that the administration of justice should not be subjected to scandal and distrust. For the reason above indicated, the judgment and order are reversed and the cause remanded for a new trial. . . .



The second trial produced no evidence not introduced at the first trial. But Gray was acquitted. It is presumed that the second judgment was a sober one.

## A DOZEN ISN'T ALWAYS EGGS

THE CASINOS OF NEVADA cannot hold a candle to the courtrooms of California when it comes to gambling for high stakes. There is no comparison between betting a fortune on the turn of a card and betting a life on the verdict of a jury.

Choosing a jury is a dangerous business. At best, the trial lawyer approaches the selection of a jury the same way a demolitions expert approaches a buried, five-thousand-pound bomb. Like the demolitions expert, the trial lawyer is armed with a working knowledge of juries. The lawyer applies his stethoscope of knowledge to the side of this ticking bomb and if he is lucky—and if he has remembered what he was taught in demolitions school—the bomb will be reduced to a harmless canister. If not, there will be an explosion that will reduce his client, and himself, to a large, smoking hole in the ground.

I have been in the business of disarming jury bombs for over forty years. In addition to innumerable civil jury trials I have, on more than a hundred occasions in my career, been called upon to defend men and women charged with murder. Each

case had one thing in common: each defendant faced the possibility of being executed in the name of the law.

Like the doctor, a lawyer cannot afford even a small mistake when he has the exposed and gaping corpus of a jury facing him. And while not one of us is perfect and all of us make an occasional mistake, we dare not make any mistakes when it comes to selecting a jury.

Now, just what *is* a jury? Well, it is supposed to be a group of the defendant's peers, his alleged equals. Obviously, to find twelve men or women or combination thereof that are the defendant's—or the plaintiff's—equals in all respects would be an impossible task. Even the highly touted computers the government has put to work selecting likely candidates for a trip to the moon would be exceedingly hard pressed to find twelve persons that in every way matched up to the litigant's personality, race, creed, and financial circumstances.

What we have today is a modified system that has been in existence for thousands of years. In these thousands of years, it would seem to me that we should have learned all there is to learn about selecting a jury. But our jury system has all the imperfections that any one man has, save that they are multiplied by twelve. Be that as it may, it is the best system we have yet devised and I would rather take my chances with a jury than try to direct an argument to the subtleties of a digital computer.

Today the jury is the only defense against arbitrary laws, the only defense against arbitrary judges, the only defense against persecution, and the only defense against our government. In short, our jury system is the only defense man has against himself.

In my own experience in the practice of the law, I have always tried to operate along the lines of a commanding general planning an attack. As anyone who has served in the Armed Forces knows, the attack is not a spontaneous effort that is launched on a whim. To the contrary, it is often a "hurry up and wait" affair that is months in the planning. Well, choosing a jury can be



similar to a military attack and not even the Almighty will help the lawyer who goes into court with no clear idea of the personalities that will be sitting before him on the jury.

Of the greatest importance to a lawyer when he walks into court will be knowledge of the persons who will comprise the jury. Jury lists are available to counsel and if the case warrants it—and *all* of them warrant it, to my way of thinking—the lawyer should avail himself of a jury list. He should study the names on that list. If necessary, he should look up these names in Polk's *Directory*, learn where these people work, in what neighborhood they live. If he feels the need for greater investigation, he should call upon an expert investigator for assistance. For when he starts asking these prospective jurors questions as to their acceptability to serve on a jury, he will not only have to know *what* questions to ask, he will also have to know when he is getting truthful answers! And, believe me, there is no short-cut way to determine when a prospective juror is telling the truth. Only pre-trial investigation of the juror's background will give the trial lawyer enough upon which to frame his questions.

I am now going to describe the way I, personally, take my bombs—the jury—apart. The lessons I have learned have been hard bought, and they are, of course, *my* lessons. They are not guaranteed to be sure-fire, for only life, death, and taxes, as Ben Franklin remarked, *are* sure-fire.

I have chosen thousands of men and women to sit on civil juries as well as in judgment of hundreds of men and women charged with a variety of crimes. And even when I have been armed with the results of a pre-trial investigation of my prospective jurors, I have always noted that what constitutes an acceptable juror—insofar as the defense is concerned—is always a conclusion based upon little or no facts.

Some trial lawyers never select anyone with an obviously serious, somber, or sour disposition. Instead, they prefer smiles. This is an obvious conclusion and it is frequently correct. However, a lawyer must take pains in his examination to determine

that this dour juror is *really* what his expression indicates he is. Perhaps he is sad *because* the defendant is on trial for his life. Then again, perhaps he is sour because his back has been injured by an automobile collision. Perhaps the case before him—if the lawyer is counsel for plaintiff—resembles a case in which *he* was the plaintiff!

Other attorneys are wary of persons whose forebears were English, German, or Scandinavian. These persons tend to believe in absolute law enforcement and severe punishment for anyone who runs afoul of the law. Such persons are ultraconservative, bull-headed, and usually have their minds made up—in favor of the prosecution—at the outset of the trial.

The outdoor or athletic type can take either side and if you can convince him, he will espouse your cause till hell freezes over.

But what do you do with a weight lifter whose name is Harry Brown, whose mother was German? There are no hard-and-fast rules on this. Just pray that your pre-trial investigation has been adequate, for if it has you may be able to throw some of these rules in the wastebasket and make a few of your own!

Jews are acceptable only if the crime is a minor one. The Jew is severe if the crime is one of violence. A brief examination of the cultural background of the Jew will explain his reasons for being severely opposed to violence. However, if the Jew is a man who is making his living as a bouncer in an East Oakland bar, you may do well to consider him as a favorable juror in an assault and battery case.

One hard-and-fast rule that has served me well is this: Never accept a wealthy person if the client is poor, nor a poor person if the client is wealthy. The gap between client and juror simply cannot be bridged and if you choose a wealthy juror who reads liberal periodicals you will *still* be gambling heavily. This a lawyer cannot afford to do, for he is not gambling with his client's money; he is gambling with years of his client's life, if not with *all* of his client's life!

A businessman is not the best juror if the client is a labor official, nor is the person who is in debt a good juror if the client is a banker or an official with a loan company.



A Southerner is often a good juror if the client is a Negro, because the Southerner will often best understand the Negro's problems.

Actors and salesmen are almost always desirable; they have seen all sides of life and know the meaning of misfortune and suffering. By the same token, writers and artists would also qualify as good jurors. And, of course, so would older men; the older man is more charitable, more understanding and forgiving than the young man.

Minor officials, functionaries, religious zealots, super-Americans, and the like tend to take the words of the prosecutor as if they came from God. Such persons have spent years in slavish obedience to authority of one sort or the other and naturally they have come to identify strongly with authority. To such persons the very fact that the client is in court is enough. In their minds he is guilty.

Finally, married men are more understanding and tolerant than bachelors. Women, of course, have always been—and always will be—a complete mystery.

These are some of my own, personal thoughts on types and traits that make good or bad jurors. Professional groups all over the country have made exhaustive studies of jury personalities and have come up with their own results. A group from Fairleigh Dickinson University in New Jersey recently polled some five hundred persons of every imaginable background in a highly specific test designed to reveal the taint of prejudice, regardless of a person's race, creed, or color. Their results are extremely interesting.

For example, this poll concluded that there is a very small amount of pure-and-simple anti-Negro prejudice in today's juries. Generally speaking, the colored juror tends to resent, slightly, the successful defendant. By the same token, the Negro is more sympathetic toward youth, the out-of-work, and the poor. Again,

do not let these facts blind you. A colored banker would be a most dangerous juror if the defendant happened to be an indigent Negro who was charged with robbing a pawnshop.

The five hundred who were tested showed little prejudice against the established religions such as Roman Catholicism, Judaism, or the many Protestant sects. There *was* prejudice felt toward some of the newer sects, especially the Seventh Day Adventists. Based upon these findings, perhaps it would be a good idea for the lawyer to advise the client to leave his copies of *The Watchtower* at home, should the defendant be on trial for a crime.

Certain occupational groups, according to the survey, cause the juror to bristle when he encounters them. Those toward whom the prospective juror is especially prejudiced are labor union officials and government functionaries. On the other hand, the study found that salesmen seem to be prejudiced against the unemployed as well as people of Latin and Middle European backgrounds. According to these studies, the salesman-juror tends to be favorably prejudiced toward the female defendant or plaintiff.

Oddly enough, a man stands a better chance of getting a fair shake from a jury than does a woman. According to Fairleigh Dickinson University's poll, men earning less than five thousand dollars a year—and women—are both strongly prejudiced against women.

As to national origins, most prospective jurors feel most strongly prejudiced against persons of Rumanian/Hungarian ancestry. On the face of it, the existence of such prejudice would usually be accepted, if we are to believe the reports of the study. But these facts should not be taken too literally. Consider the De Kaplany case, recently tried in Santa Clara County. The defendant was admittedly guilty of a most heinous mutilation killing, was a Hungarian national, yet somehow escaped with his life while seemingly the odds dictated the gas chamber. Perhaps his economic circumstances had something to do with the



sentencing, I don't know. I *do* know that a lawyer can *never* arrive at an absolute set of values when picking a jury.

How much can a lawyer learn from a juror, based upon what he says and how he presents himself? Well, of course not one of them will admit that he has carefully followed the proceedings in the newspapers. On the contrary, the answer the prospective juror will give when asked about his familiarity with the case is: "Well, sir, about all I have done is glance quickly at the headlines." After a lawyer has heard this over a period of years, he will be tempted to add under his breath: "Yes, but you surely took your time reading that *fine print*. . . ."

It has been said that the face is the mirror of our soul. This is not always true. Eichmann looked like a villain, yes, but his chief, Himmler, looked like a man who could not even form the intent to commit crime.

A lawyer must go further when he physically as well as orally examines the prospective juror. He must consider such factors as the juror's mode of dress. Is this man, for example, wearing what appears to be his only suit, and a threadbare one at that? He might be a good juror if the defendant is a poor man. He will be a bad juror if the client is a wealthy one.

Does the prospective juror's face, hands, or other visible body surface appear scarred? Has he been in an accident at one time or the other? Would he be sympathetic if the client is asking damages for pain and suffering? Is this juror old and infirm? Does he or she wear a brace, arch supports? While we are not gifted, as is Superman, with X-ray vision, our eyes can tell us much by the way a person carries himself, how he moves his hands and arms.

Is this juror nervous and flighty? Does he wipe his lips frequently? Does he bite his fingernails? Does he pluck at his cuffs, or, if the juror is a woman, does she pick at her nail polish? If so, here is a flighty mind at work—a mind that will be hard pressed to follow the case. And what about ornaments? What about lodge rings, lapel decorations and ornaments?

These are some of the things that only experience can teach a lawyer, but they are small details that cannot be ignored. If the client never saw military service and is charged with the crime of assault, the lawyer would do well to disqualify that juror who is frowning, whose name is MacPherson, and who wears a miniature Silver Star decoration in his lapel buttonhole.

No matter how many cases a lawyer may try, it is always hard for him to keep calm and unruffled when he begins to examine the prospective jurors. A jury trial is dramatic and complex and the successful trial lawyer must not only keep his wits about him at all times, but must also be one who knows the rules. The successful trial lawyer is keen and vital; he understands something of men and their motives. He knows that the litigants have reverted to their most primitive instincts and are now fighting like primordial animals, eager for victory, asking—and giving—no quarter.

From the moment the trial lawyer lays his papers on the counsel table his every act and word means something to the jurors. They will watch him like a hawk. If he conducts himself properly, they will continue watching him, and listening to his every word, when he begins to sum up.

In his questions directed toward the prospective juror, the good trial lawyer will attempt to discover all he can about each juror and he will often use what he has discovered to alert the juror to his, the lawyer's, theories about the case. The good trial lawyer will not make the mistake of thinking that one theory will suffice for all twelve jurors. It will not, no more than one line of reasoning will allow a parent to govern seven different youngsters. In the examination of the prospective juror, each and every question must mean something, either providing information for judging the juror or enabling the lawyer at this early stage of the trial to lay the foundation for his case.

A trial lawyer should never make it necessary for the juror to say he does not hear the question. If the juror is wearing a hearing aid or similar device, it is not necessary to shout at him. The



lawyer should speak firmly and slowly, if necessary, but he should not make this kind of juror feel either that he is unimportant or that the lawyer is obviously patronizing him. As a matter of fact, if the juror *is* hard of hearing and he discerns that the lawyer is taking special care to be understood—without making a great show of such an elementary kindness—the juror will respect the lawyer for it.

In *all* cases, the lawyer should speak clearly and distinctly. Most laymen believe that the lawyer is a cultured and educated person. They are not in court to hear and see the same things they see during their average, workaday life. They are in court to see *lawyers* and they have their own ideas of what a lawyer should be, how a lawyer should act. If a lawyer disappoints them he is halfway toward losing them.

When we are about to meet someone important we are always on our best behavior. This is how it should be when a lawyer first meets his prospective jury. He may never see any of these people again—that is of no importance. Right now these jurors are the most important people in his life, doubly important, for his client has entrusted his cause to him. When you have another's responsibilities to handle they must always be more important than your own. This, fundamentally, is what being a lawyer is all about.

The lawyer's questions should be framed as questions and not as assertions, even if he knows the answers in advance. All of his questions should be concise and certain. They must never be argumentative. They must avoid assumptions and must in all cases call for direct answers.

Juries like to feel that their winning lawyer is made of the same stuff as they. Therefore, it is unwise for a lawyer to be *too* brilliant, too overtly. He should never, by a word or by an act, permit the jury to feel that he thinks he is better than they. In keeping with this, no great lawyer ever memorizes an argument; he frames his speech to the jury in such a way that it will not clash with the court. Most juries believe that judges are wise

umpires and the losing lawyer in a controversy destroys—in the jury's eyes—the effect he has planned.

A lawyer should use simple and plain English when addressing the jury. We live in a complex and confusing world and the juror is keenly aware of this. A lawyer should not go off on semantic flights, nor should he go to the other extreme and keep his statements and questions on the level of a fourth-grade reading assignment. He should aim for a middle balance.

The juror will have heard, somewhere along the line, that lawyers are a tricky body of skilled professionals who use legal terminology to cloud facts. The lawyer may counteract much of this propaganda by avoiding the usage of such words as "prior" and "subsequent," using instead, "before" and "after."

The jury a lawyer first questions—and later addresses—has great responsibilities that weigh heavily upon their collective mind. It is all they can do to sift through the mass of fact that confronts them. It is the lawyer's task to make them understand that fear, prejudice, malice, and the love of approbation bribe a thousand men where gold bribes only one.

The collected powers of the juror's mind must continually be fixed upon the issue of fact which he is sworn to try. But—unless the juror has a clear understanding of the law applicable to the issue—his efforts are in vain.

The law is always changing, expanding, contracting. I have recently heard of experiments being conducted that could, theoretically, allow counsel to make short psychological tests upon the poor juror's psyche as he sits in the jury box. Frankly, such a method does not greatly appeal to me. But, who knows? Perhaps the courts of the twenty-first century will consider such a device commonplace.

To me, the law is not only today but it is also rather beautifully colored and tinged with traces of yesterday. For example, when I think of making an opening statement for the plaintiff before a jury in a damage suit I hasten to become reacquainted with Charles Dickens's classic *Pickwick Papers*. You will recall Ser-



geant Buzfus, who represented the Widow Bardell and who read his dramatic and devastating peroration against the gentle and innocent—but greatly alarmed—Pickwick.

"But Pickwick, gentlemen, Pickwick, the ruthless destroyer of this domestic oasis in the desert of Goswell Street—Pickwick, who has choked up the well, and thrown ashes on the sward—Pickwick still rears his head with unblushing effrontery, and gazes without a sigh on the ruin he has made. Damages, gentlemen—heavy damages is the only punishment with which you can visit him; the only recompense you can award to my client. And for those damages she now appeals to an enlightened, a high-minded, a right-feeling, a conscientious, a dispassionate, a sympathizing, a contemplative jury of her civilized countrymen."

## VENGEANCE IS MINE

For many years I have made almost daily ventures into the incongruous structure that is San Francisco's Hall of Justice. When I depart it is always with a feeling of despair over the legal destruction of man occurring within its cold confines. These are harsh words. But murder is harsh, particularly when committed in the name of the People of the State.

Law is based upon the theory that justice owes something to each individual; that each gets what is owed him; neither more nor less. No man can quarrel with the theory of justice, but there is room aplenty for criticizing the methods and reasoning through which it is actually administered.

Charity and understanding and forgiveness should be unwritten mandates in every law. If not, our halls of justice would stand today as testimony of an uncivilized people who built them as defense against their own hatreds.

Today the guaranteed rights in our Constitution are idealistic in content, beautiful in print, circumvented in our mass thinking, and abridged by our fifty-five million laws. Legal revenge is the mood of the day, and each safeguard of liberty has been battered by revengeful reformers. The principle of law that every man is entitled to a fair trial is gone and almost forgotten. Most assume that arrest is synonymous with guilt.

For every crime there must be punishment. But what is crime? The misconduct in others we repress in ourselves? Or are we so pure that we delegate punishment to a judge who may or may not be just and understanding?

Before punishing, it is the judge's duty to weigh carefully not only his responsibility to the people who elected him or appointed him, but also his responsibility to the citizen who stands before the bar of justice convicted of a crime.

Those who clamor for more stringent penalties usually know nothing of the background or mental capacity of the defendant, nor do they care. When an eye for an eye was the only penalty theory, the offense determined the punishment without regard to responsibility, culpability, or mental capacity. There was no thought of rehabilitation and no desire to save a human wreck cast upon the rocks of despair.

A criminal is as much a part of the community and a product of society as you or I. Have any of us thought of the reasons for the crime, the contributing causes, the mental capacity of the defendant, the economics of his living, or whether the community, and not the defendant, is the guilty party?

Crime and punishment have been problems from the day the first law was set down. It is no solution to demand creation of new offenses or an increase in the penalties for those already in existence.

Almost half a century ago the State of Missouri published a survey of crime which eloquently reported that severity of punishment had no effect on man and does not deter crime. The report, in part, reads:



> . . . Ever since creation's peaceful dawn was startled by the death cry of the murdered Abel and Jehovah placed his mark upon Cain and sent him forth a fugitive and a vagabond, cursed from the earth that had opened its mouth to receive his brother's blood from his hand, there has been a neverending conflict between those who make the laws and those who break them. Nothing has afforded such harrowing and conclusive evidence of man's inhumanity to man as has this age long struggle. It has meant the rack and the stake, banishment and bondage, the Bastile and the Tower, the mines of Siberia and the dungeons of Doges. With refinement of torture that has taxed the cruel ingenuity of man, it has claimed as its unhappy victims in every age and every race, the prince and the peasant, the noble and the nobody, the king and the subject, the savage and the saint. Still crime persisted. Indeed, never was it so flourishing as when torture was most barbarous, the punishment most severe. . . .

Conditions today are no different.

Mankind has progressed noticeably in his civilization. He has progressed from the torture chamber to the gas chamber, but he has insisted on and now has more sanitary surroundings at the place of execution. The defendant is still murdered by the State with the judge's soothing: "May God have mercy on your soul."

Crime is a disease. Evil must be treated with charity instead of anger. Love of man, no matter what kind he may be, must displace the gas chamber, the scaffold, the electric chair. Reason and experience must overcome hatred and revenge.

Psychiatry has proven that punishment is a need of both the prosecutor and the defendant. Analyze a cold-blooded prosecutor and there appears a man who reveals the intensity of his inner struggle to defend against his unacceptable moral and social urges; to defend against drives which he does not consciously admit. Human motivations are of an unconscious nature.

If we accept punishment as the only medicine for crime, shall man be punished for punishment's sake or is there another way? Humane treatment outside prison has a place in our criminal procedure rather than an emotional get-even attitude; rehabilitation not retribution.

Certain crimes are committed impulsively by men of previous good character who are not likely to threaten society again. In the commission he suffers more punishment than can be given by the law; the stigma of the crime is punishment enough.

If we desire to be just, let us first persuade ourselves that there is not one among us without fault; no man can acquit himself, and he who calls himself innocent does so with reference to a witness, and not to his conscience.

Bigger prisons will not end criminality. Rehabilitation will lessen the number who each day add to our national deterioration.

*Vengeance is mine, sayeth the Lord.*

## GENTLEMEN OF THE JURY

TWENTIETH-CENTURY MAN has a multitude of obligations and responsibilities he must answer to, one of the greatest being his duty to serve on a jury.

Too many times such service is considered a burden, when in reality it is an honor to be sought instead of shunned.

True, it requires time and patience and thought to probe the evidence and determine guilt or innocence, right or wrong.

But it has to be such, for the jury is man's only defense against arbitrary laws, his only defense against arbitrary judges, his only defense against persecution, his only defense against the government.

When he dons the title of juror, man assumes a moral responsibility second to none, for his decision in a court case, especially one of a criminal nature, may mean the difference between life or death, imprisonment or freedom, ruination or exoneration.



Law has been subjected to the scrutiny of philosophers since the beginning of recorded history. St. Paul preached that the law is good, if man uses it lawfully. Cicero went much further and contended that if the fortunes of all cannot be equal, if the mental capacities of all cannot be the same, at least the legal rights of all ought to be equal.

To insure equality before the law, man adopted the jury system. This manner of trying issues by the people grew from the ancient trial before the elders sitting in judgment at the gates of every encampment and city in ancient Israel, and was the forerunner of trial by jury as established in England some time after the year 1066 A.D.

If the responsibility of the juror is great, the responsibility of the lawyers participating in the defense, or prosecution, of an individual is of no less importance. The lawyers must present their respective cases honestly and lucidly, and both must inform the jury of its duty to judge only on fact, and to presume innocence only until guilt should become apparent beyond a shadow of a doubt.

In the forty years I have been trying jury cases, it has been my most important effort to explain to each juror the importance of his position as a judge of his fellow man, and what is meant by trial of an individual by a jury of his peers.

In every instance, as the jury has filed out of the courtroom to begin deliberation, I have questioned my final address—was it sufficiently illustrative to make the jurors appreciate their responsibilities?

You can, therefore, understand my delight when I discovered, while perusing a law journal, the charge given to a jury by the Honorable Gordon W. Chambers, Judge of the City Court of Richmond County, Georgia.

I have never met Judge Chambers, but he is known to me from the wording of his charge. Here is a man who fully understands the juror's position in relation to the administration of justice and to the timeless phrase "a jury of your peers." This is what Judge Chambers said:

> Gentlemen of the Jury, by being selected for jury service you have been elevated to the peerage of democracy. As such you have a noble opportunity for service, obligated by patriotic duty to God and Country. This duty is deserving of the consecrated dedication of a conscientious concentration of your abilities and the just impulses of your honor.
>
> You are a shield of protection against false accusers, transitory passions and prejudice. You are determiners of truth revealing the character of our country as a land of the free and home of the brave.
>
> You are the preservers of liberty that walks with progress and restrains only libertine license to insure its own freedom. You are the protectors of all legal rights of society, citizenship and the state. You are guarantors of justice, constitutional and statutory, exactly, evenly and universally applied.
>
> You are the custodians of American civilization, for without law there can be no civilization, without courts there can be no law, and without truth and independence there can be no courts.
>
> The only title of nobility recognized by America's loyal house is in the peerage of the jury box where trial by peers determines the truth of issues between the state and its citizens. This title carries no feudal privilege of materialistic value. However, it merits the accolade of achievement–the accomplishment of the aristocracy of service.
>
> This high honor carries only the title as a word of address or as an adjective or description: Gentlemen of the Jury.

Every man should thank God that we have among us one such as Judge Gordon W. Chambers, and every judge and citizen should read his words.

## WHAT'S WRONG WITH THE JURY SYSTEM

IT HAS BEEN SAID that we live in a world of illusion. If this be true, join me while I take a brief excursion into the impressionistic world of fantasy, for a moment, using one of the trial lawyer's most basic tools: the analogy . . .



You are a learned physician, a neurosurgeon (not a resident named Casey, I might add), and you have just opened up the skull of a living human being. On a table beside you are your complex, gleaming instruments; nurses and assistants wait for your very word to carry out your orders. You have examined the patient whose brain now stands revealed before your eyes; you and you alone know what must be done to save this man's life. You give a complex set of instructions to your assistant and . . .

Nothing. Absolutely nothing happens. You look up from your labors, desperate, for there is not a moment to lose, and instead of skilled associates, trained for years in the fine art of neurosurgery, you see before you twelve bank tellers, their fingers still green from counting money and their eyes wide with incomprehension of what you are doing. To make the analogy more biting, perhaps I ought to add that three of these bank tellers are dozing soundly on an unoccupied bench located near the door.

We are now back to reality, having left our literary Disneyland far behind. Of course we know that twelve bank tellers, no matter how fine or noble they might be, would never be allowed in an operating theater under any circumstances. Their background, their training–nothing they have experienced would qualify them to assist a surgeon in his occupational specialty. By the same token, few of us would presume to tell a skilled craftsman how to repair a two-thousand-dollar Patek Phillipe wrist watch. Finally, we all know what would happen if we attempted to lecture a plumber on how he should repair the leaky pipes in our house; we would have to hasten down to the dentist and have our bridgework repaired.

And yet in the most serious business of all–the sitting in judgment on a fellow human being–any adult citizen in our land is somehow automatically considered expert!

As previously pointed out, Cicero contended that if the fortunes of all cannot be equal, if the mental capacities of all cannot be the same, at least the legal rights of all ought to be equal. To guarantee at least partially this equality before the law, man

adopted the jury system. The jury system, as I have said, stems from the ancient trial before the elders of Israel, which was the forerunner of the trial by jury, later established in England some time after 1066.

Today, the jury—representative human beings who are, ideally, from all walks of life—is our only defense against arbitrary laws, arbitrary judges; it is our only defense against persecution and, most important, our only defense against the cold and impersonal entity we know as Government. To make another analogy, our jury system can be compared to the Dutch boy with his finger in the dike; without this collective "finger" we would soon be inundated.

For some years, now, an organized attack from many quarters has been leveled against the jury system. While it is true that many arguments included in this attack may be valid, it is my belief that if anything is wrong with such a system, blame ought to be placed on the truly responsible party: the trial judge.

Few people outside the Law (and few within it, to be candid) really understand the function of the trial judge. Pulp literature, the public's awe of this black-robed figure, and human frailties that cannot, and should not, be discarded by him who wears these black robes have done much to cloud and disguise the duties of the modern-day trial judge. In keeping with my premise that we are in every sense a by-product of history, perhaps we should examine just how the role of trial judge came about.

In primitive times—long before man was judged by an aggregate of his peers—the primitive judge was expected to administer justice directly, determine the guilt or innocence of a defendant, and mete out punishment according to the gravity of the offense. For a parallel, I cite the action of God in the cases of Divinity versus Adam and Eve and Almighty versus Cain. This was the function of the earliest judge; he was the right hand of God, on earth. Authority for this may be found by the Doubting Thomas in St. Luke, where he may read: "He is an unjust judge if he



fears not God nor regards Man, but gives justice lest he become weary of being troubled by those who seek it."

Well, we have come a long way in our legal, political, and moral travels since that time. Today, the role of the trial judge can often be compared to that of a referee in a boxing match. We expect the judge not to yield to the influence of partiality, prejudice, or sentiment; nor do we expect him to seek out strained analogies or blind himself to reality by a slavish adherence to technicalities. We want to fill the seat of Justice with good men, but not so absolute in goodness as to forget the frailty of the human being.

What a series of contradictions! We seem to be saying that we want a kind of Composite Man—a mixture of Nietzsche's "Superman," Albert Schweitzer, and a Mark VI computer with self-regulating feedback. If such a contradiction of values were put into effect we should all have to wait at least a thousand years before our cases came to trial. Unhappily, man is a cynical fellow, capable of paying lip service to an ideal while being capable, at the same time, of dealing in stark totalities. The result? Average man, with all his faults and foibles, cloaked in a black gown.

I once served with a fine noncommissioned officer during the days of Black Jack Pershing and Pancho Villa. This man had had many years of honorable service in the Army and he had advanced to the rank of sergeant. As a sergeant he was unquestionably brilliant. Then, some functionary in the War Department made a monumental blunder; on the assumption that a man who was a fine N.C.O. would make a brilliant second lieutenant, our sergeant was commissioned an officer. The result? Disaster!

As it is difficult to explain why a fine sergeant could be a poor officer, so it is equally difficult to explain the many elements that can make a pleasant, amiable, capable lawyer into a harsh and unrelenting judge. I suspect that a good test of the so-called reformer would be to make him a judge for six months. In the

end, perhaps, he would discover that he should first practice upon his own heart that which he had proposed to try on others. Only mercy has a human heart; when man is in a position that has suddenly changed from the abstract to a swift, concrete reality, he often discovers what it is that truly dwells within his own heart.

I should not like this to be entirely construed to be a quarrel with the judiciary, but years of experience in trial courts have never completely restrained me from addressing some of these courts in rather caustic terms. And if I did so, it was because the judge had flatly indicated to me that he, and secondly God, was right. While there is no higher position of trust in all of our land than that of a judge, even the court must bear in mind that God never proposed to judge man until the end of his days.

Now, let us walk into court. We are about to try a man for his life and we shall first observe the judge and the jury. Let us try to search their hearts and minds to learn whether the so-called murderer will receive a fair trial; let us try and learn why man is charitable toward physical deformity and vengeful toward moral and mental deformity. Let us see if Justice will remove the bandage from her eyes long enough to distinguish between the vicious and the unfortunate.

In order for a jury to understand properly just what the charges, and their significance, against the defendant are, the jury ought to know that murder is the unlawful killing of a human being with malice aforethought. The judge may think that the term—malice aforethought—is easy for the jury to comprehend. But is it? And who, at the beginning of the trial, ought to determine just how much of this concept the jury comprehends? Well, inasmuch as the defendant's lawyer is fighting for his client's life it would follow that he, the attorney, should know something of what is going on inside the few cubic centimeters of the average juror's head. And yet there are those judges who will insist that the trial lawyer not take up his time—and the time of the jury—with what he considers



to be useless questions while impaneling, or choosing, the jury. The judge says he will instruct the jury as to what malice is. Well, that is all fine and dandy—assuming (1) that such instructions are truly given, and (2) that the court's instructions so closely parallel defense counsel's that the defendant's interests have been scrupulously protected.

But if judges did these things, then we wouldn't even need a defense counsel, would we?

Well, we know that the judge will instruct the jury on the law, but is the average juror mentally equipped to understand what the judge is talking about? Is the average bank teller equipped to understand the instructions of a neurosurgeon in an operating theater? Instructing the jury has been described somewhat humorously as: "The process in which the judge detracts from and discounts counsel's multiple arguments, makes his own deductions, adds his own wisdom, divides the blame, and roundly charges the jury to deliver a square result."

Does that sound like a recipe for justice? To me, it smacks more of the formula for making dynamite!

As you may quickly gather, this system of instructing juries, so uniformly followed, is rank injustice to the litigants and a travesty of justice in the bargain! How few lawyers and judges there are who can define the various phases of the law of homicide without a book in one hand and a set of pince-nez glasses in the other, the better to perceive the fine print!

As I have mentioned before, murder is the unlawful killing of a human being with malice aforethought. This malice is an essential element of the crime and it is extremely important that its semantic and legal meaning be thoroughly explained to the jury. Therefore, the judge will instruct the jury:

> Malice may be express or implied. It is express when there is manifested a deliberate intention to take away the life of a fellow-creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

Well, to begin with, such concepts of criminal law as learned

judge has just imparted belong to the fifteenth century and are as alien to our modern world, today, as the witch's broom. In each thousand-year cycle, it often appears, there is one brilliant mind capable of laying down sound concepts of conduct; for the next nine hundred and ninety-nine years, none dare touch them, so in awe are they. Sir William Blackstone, the learned English jurist, was the first to educate the world as to the features and disadvantages of our basic law. Blackstone wrote his commentaries between 1765 and 1769 and our law has made little advance since his day. If our skilled neurosurgeon were to practice some of this fifteenth-century medicine on an ailing skull, you may be sure that the good doctor would be sent to the penitentiary with all due haste! And yet we continue, in the field of the law—a field surely as important as the doctoring of ailing bodies—to talk of concepts that were alien to our finest minds *before the 1800s!*

Now, let us return to the courtroom and let us ponder just how the jury has received the court's instructions. The answer to all this pondering is quite simple: The jury doesn't know what the court is talking about! Neither the jury—nor the judge—know what the term "an abandoned and malignant heart" means. And to further addle the juror, the judge will read for all to hear that "the bare existence of hatred, ill-will, and the like does not amount to legal malice."

At this point it is small wonder that the poor juror falls asleep or seriously begins to wonder which way "up" is.

The court will not be halted and, like a deacon who is in haste to get through a sermon and sit himself down to a fine chicken dinner, rumbles on to read: "Malice aforethought is not synonymous with the elements of deliberation and premeditation which must first accompany a homicide to characterize it as murder of the first degree . . ."

Well, now he's done it! The legally uneducated juror will at this point experience a revelation of the greatest magnitude! He will now know exactly what the judge is talking about! And of



course his honor will gladly permit the trial lawyer—the man fighting for the life of his client—to explain minor and unimportant things such as deliberation and premeditation. Every juror must know how to apply the law in this connection—when the *other fellow* is on trial for his life!

The litany from the bench drones on and on: "The state must prove to a moral certainty and beyond a reasonable doubt that the accused person had the mental intent to take the life of the person killed, and that such mental intent was arrived at as the result of deliberation and premeditation . . ."

Simple? Yes, possibly, if you are able to read it, and read it again, and read it perhaps for a third time. But what does the juror, sitting in his chair in an oppressive and over-warm courtroom get from it? Do you believe for even a moment that the juror understands this instruction and, if he does, is capable of applying it to the evidence? Of course he can't, no more than I could listen to a lecture on nuclear physics and then go out and build an atomic reactor!

The judge will conclude his reactions, his voice rising sharply from time to time as one head after the other—all in the jury box—nods downward, snaps backward, then down again:

> "The state must establish to a moral certainty and beyond a reasonable doubt: (1) that the defendant did kill the deceased, (2) that such killing was accompanied by a mental intent to take the life of the person killed, and (3) that such mental intent was arrived at by the accused upon the result of the thought and weighing of considerations on his part. By his weighing the act in his mind and considering the reasons for and against such act, and by his having previously contrived and designed to do such act. Such contrivance and design having been arrived at as the result of deliberation."

The oration finished, a hush fills the courtroom. This sudden quiet awakens the jurors just in time to see the counsel for defense, and the district attorney, weeping and silently pulling out their hair!

My purpose is not to attack judges or to belittle juries. Instead, it is my purpose to put more understanding and humanity into our trials. It is not enough to search with our minds; we must reach with our hearts.

During long years of law practice it has been my duty to try many civil and criminal cases, and often the public has condemned the criminal trial lawyer as one who is full of tricks, who will do anything to win. It is sad to realize that such an attitude frequently finds willing believers, for no injustice should be done the criminal trial lawyer by attributing to him any want of loyalty to truth, or any deference to wrong, simply because he employs all his powers and attainments toward exhibiting and enforcing the merits of his case. And if sometimes the criminal trial lawyer works too hard, gestures too much, and raises his voice on occasion, it is often because he is working desperately to educate a jury that has been hopelessly muddled, or worse, by a combination of incomprehensible instructions and a malevolent prosecution. Would you not work as hard were you charged with protecting a man's life?

The profession to which we belong is, of all others, fearless of public opinion. It has ever stood up against the tyranny of power, on one hand, and the tyranny of public opinion, on the other. Coupled with these adversaries, always, is the most formidable enemy of all: the poorly instructed, legally uninformed jury. Perhaps the following little anecdote will go a long way toward explaining what I have been trying to say.

A juror was once asked, "Do you have any objection to capital punishment?"

The juror rolled his eyes, wrinkled his brow, licked his lips, and solemnly replied, "No, not unless it is too severe."

# INSTRUCTIONS ON A KILLING

THE CONDUCT OF MAN has always been guided by certain rules. Even the Jívaro Indians, South African head-hunters, have a form of protocol they must follow as they go about the task of shrinking the head of the victim who was unfortunate enough to come their way.

In our so-called civilized society we too are guided by rules, whether we are operating an automobile, laying bricks, or trying lawsuits. These "rules of the road" are as necessary for existence as the very food and drink that sustain us, although I am inclined to believe that sometimes we have too many, rather than too few, rules to guide us.

When a trial by jury is about to end, the judge is required to instruct the jury on those phases of the law that are applicable to the facts, through evidence, that have been brought out by the witnesses during the course of the trial. The judge's interpretation of the rules of evidence are known as instructions, and while the judge must say nothing to the jury that will *directly* influence their verdict, he will nevertheless lay down certain "rules of the road" that will tend to guide them when they retire to ponder the case.

This function of the judge—the giving of instructions—requires that the instructions be legally correct. Beyond this, the judge should do his best to deliver the instructions in such a way that the jury will comprehend them. The judge must, in whatever wisdom he may possess, attempt to reduce legal complexities to the comprehension of the average man in the street. This task, by the way, can sometimes be compared to the job an American

would have if he tried to explain the significance of a parking meter to a Siberian.

Most judges, alas, tend to read the instructions with the same monotony that one might expect to hear from an Indian fakir as he recites a plea for alms. And like the tourist who is in a hurry to get to one place or the other, the jurors will, at best, be bored by such a litany. At worst, they will fall asleep.

While it is acknowledged that Justice is blind, there is nothing in the law that says the judge must feed her tranquilizers.

To offset the effect of those judges who deliver instructions designed to stupefy and befuddle the jury, there occasionally comes a jurist who is not only a learned lawyer but also a just human being, a man greatly concerned with the equality of all men before the law. In the following instructions which such a judge delivered to a jury, you will decipher the story of a killing. You will learn something of the parties involved in the killing, their motives, and, perhaps, their degree of guilt.

It is unlikely, by the way, that you will be put to sleep.

"Ladies and gentlemen of the jury. I shall, in discharging the duty incumbent on me, consume as little more of your time as may be consistent with a clear exposition of the principles necessary to be understood in order to form a just and legal decision.

"You have heard the facts in the case stated by the witnesses, ably and ingeniously commented upon by counsel, and the principles of law discussed in forcible and eloquent arguments.

"It is now left to you upon the whole view of the case, both of the law as it shall be declared to you by the Court, and the facts as proved by the testimony, to pronounce your verdict.

"The crime charged is manslaughter. This crime consists of the unlawful killing of a human being, without malice. However, the killing of a human being, under some circumstances, is not only excusable but justifiable under the law.

"Some persons entertain the visionary notion that it is in no instance lawful to destroy the life of another, grounding their opinion upon the general proposition in the Mosaic code that



'whosoever sheddeth man's blood, by man shall his blood be shed.' There is always danger in taking general propositions as the rules of faith or action without attending to those exceptions which, if not expressly declared, necessarily grow out of the subject matter of the proposition.

"Were the position above alluded to true, then the judge who sits in the trial of a capital offense, the jury who may convict, the magistrate who shall order execution, and the person who shall execute, will all fall within this general denunciation, as by their instrumentality the blood of man has been shed.

"The same observations may be applied to one of the precepts in that the decalogue, 'Thou shalt not kill,' is the mandate of God himself. Should this be construed literally and strictly, then if a man attacked by a robber, or in the defense of the chastity of his wife, or of his habitation from the midnight invader, should kill the assailant, he would defend himself against the divine command. But the common understanding of mankind will readily perceive that the very nature of man, and principles of self-preservation, will supply exceptions to these general denunciations.

"Our laws abundantly negate such unqualified definitions of crime, and have adopted certain principles by which the same act may be ascertained to be more or less criminal or entirely innocent, according to the motive and intent of the party committing it.

"Thus, when the killing is the effect of particular malice or general depravity, it is murder and punished with death.

"When without malice, but caused by sudden passion and heat of blood, it is manslaughter.

"When in defense of life, it is excusable.

"When in advancement of public justice, in obedience to the laws of the government, it is justifiable.

"These principles are all sanctioned by law and morality, and yet they all contradict the dogma that 'whosoever sheddeth man's blood, by man shall his blood be shed.'

"A man who, in the lawful pursuit of his business, is attacked

by another under circumstances which denote an intention to take away his life, or do him some enormous bodily harm, may lawfully kill the assailant.

"When, from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing of the assailant will be excusable homicide, although it should afterwards appear that no felony was intended.

"To illustrate, take the following case: A, in the peaceful pursuit of his affairs, sees B rushing rapidly towards him, with an outstretched arm and a pistol in his hand and using violent menaces against his life as he advances. Having approached near enough, in the same attitude, A, who has a club in his hand, strikes B over the head before or at the instant the pistol is discharged, and of the wound B dies. It turns out that the pistol was loaded with powder only, and that the real design of B was only to terrify A. Will any reasonable man say that A is more criminal than he would have been if there had been a bullet in the pistol? Those who hold such doctrines must require that a man so attacked must, before he strikes the assailant, stop and ascertain how the pistol is loaded, a doctrine which would entirely take away the essential right of self-defense. And when it is considered that the jury who try the case, and not the party killing, are to judge of the reasonable grounds of his apprehension, no danger can be supposed to flow from this principle.

"As to the evidence, I have no intention to guide or interfere with its just and natural operation upon your minds. I hold the privilege of the jury to ascertain the facts, and that of the Court to declare the law, to be distinct and independent. Should I interfere with my opinion on the testimony in order to influence your minds to incline either way. I should certainly step out of the province of a judge, into that of an advocate.

"All which I conceive necessary or proper for me to do is to call your attention to the points of fact on which the cause may turn, state the testimony in the case which may tend to establish



those points, give you some rules by which you are to weigh testimony if a contrariety should have occurred, and leave you to form a decision according to your best judgment, without giving you to understand, if it can be avoided, what my opinion of the subject is.

"Where the inquiry is merely into matters of fact, or where the facts and the law can be clearly discriminated, I should always wish the jury to leave the jury-box without being able to ascertain what the opinion of the Court as to those facts may be; that their minds may be left entirely unprejudiced to weigh the testimony and settle the merits of the case.

"An important rule in the present trial is that on a charge for murder or manslaughter, the killing being confessed or proved, the law presumes that the crime as charged in the indictment has been committed, unless it should appear by the evidence for the prosecution, or be shown by the defendant on trial that the killing was under such circumstances as entitle him to justification or excuse.

"On the point of killing, there is no doubt in this case. The young man named in the indictment unquestionably came to his death by means of the discharge of a pistol by the defendant.

"The great question in the case is: Whether, according to the facts shown to you on the part of the prosecution, or by the defendant, any reasonable, legal justification or excuse has been proved.

"From the testimony of several prosecution witnesses, it appears on the day set forth in the indictment, the defendant was in his office a little before one o'clock; that in a conversation about his quarrel with the father of the deceased, he intimated that he had been informed an attack upon him was intended, and that he was prepared. That a short time afterward, he went from his office towards the United States Bank. That as he walked his hands were behind him, outside of his coat, without anything in them. There is testimony that when the deceased approached, the defendant put his right hand in his pocket and

took out his pistol, while his left arm was raised to protect his head from an impending blow.

"The manner of his going, the weapon which he had with him, the previous intimation of an attack which he seems to have received, and the errand upon which he was going, are all circumstances worthy of your deliberate attention.

"Passing down the street as before described, several witnesses testify that the deceased—who was standing with a cane in his hand, near the corner of the Norwalk Building—having cast his his eye upon the defendant, shifted his cane into his right hand, stepped quick from the sidewalk onto the street, advanced upon the defendant with his arm uplifted; that the defendant turned, stepped one foot back; that a blow fell upon the head of the defendant and the pistol was discharged at the deceased at one and the same instant. Several blows were afterwards given and were attempted to be parried by the defendant who threw his pistol at the deceased, seized upon his cane, which was wrested from him by the deceased, who, becoming exhausted, fell down and in a few minutes expired.

"One witness testified that having expected to see a quarrel on State Street, in consequence of the publication against the deceased's father in the morning, he went there for the express purpose of seeing what should pass; that he saw the defendant coming down the street, saw deceased advance upon him; that he had a full view of both parties, was within fifteen feet of them; that he saw a blow fall upon the head of the defendant with violence; that the arm of the deceased was raised to give a second blow which fell the instant the pistol was discharged. This is the only witness who swears to a blow before the discharge of the pistol; but he swears positively, and says he has a clear, distinct recollection of the fact. His character is left without impeachment. If you consider it important to ascertain whether a blow was or was not actually given before the pistol was fired, you will inquire whether there are any circumstances, proved by other witnesses, which may corroborate or weaken this testimony.



"You will consider the testimony of the witness who testified that the left arm of the defendant was over his forehead, as though defending himself from blows, when he saw the blow fall. You will consider that all the witnesses state that the blow which they saw, and thought the first, was a long blow across the head.

"If you find a difficulty in settling the fact of the priority of the blow, take this for your rule: that a witness who swears positively to the existence of a fact, if of good character and sufficient intelligence, may be believed, although twenty witnesses of equally good character swear that they were present and did not see the same fact. The confusion and horror of the scene was such that it was easy for the best and most intelligent of men to be mistaken as to the order of blows which followed each other in such rapid succession that the eye could scarcely discern an interval.

"You will, therefore, compare the testimony of the witnesses where it appears to vary, attending to their different situation, power of seeing, and capacity of recollecting and relating, and settle this fact according to your best judgment, never believing a witness who swears positively to be perjured, unless you are irresistibly driven to such a conclusion.

"When the defense is that the assault was so violent and fierce that the defendant was obliged to kill the deceased to save himself, it surely is of importance to ascertain whether the violent blow he received on his forehead, which at the same time that it would put him off his guard, would satisfy him of the design of the assailant.

"When a weapon is used, it seems to me that the effect produced is the best evidence of the power and intention of the assailant to do that degree of bodily harm which would alone authorize the taking of his life on the principles of self-defense.

"But whether the firing of the pistol was before or after a blow struck by the deceased, there are other points of more importance for you to settle, and about which you must make up your minds, from all the circumstances proved in the case, such

as: the rapidity and violence of the attack; the nature of the weapon with which it was made; the place where the catastrophe happened; the muscular debility or vigor of the defendant, and his power to resist or to fly.

"If you believe his only resort for safety was to take the life of his antagonist, he must be acquitted unless his conduct has been such, prior to the attack upon him, as will deprive him of the privilege of setting up a defense of this nature. It has been suggested during the argument by the defendant's counsel that even if his life had not been in danger or no great bodily harm, but only disgrace was intended by the deceased, there are certain principles of honor and natural right by which the killing may be justified.

"These are principles which you as jurors, and I as a judge cannot recognize. The laws which we are sworn to administer are not founded upon them.

"Let those who choose such principles for their guidance erect a court for the trial of points and principles of honor; but let the courts of law adhere to those principles which are laid down in the books, and whose wisdom ages of experience have sanctioned.

"I therefore declare it to you as the law of the land that homicide is justifiable when committed in defense of the person, against one who manifestly intends or endeavors to do some great bodily injury upon the person of the defendant. But the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone.

"I ought not to rest here, for although I have stated to you that when a man's person is fiercely and violently assaulted, under circumstances which jeopardize his life or important members, he may protect himself by killing his adversary; yet he may, from the existence of other circumstances proved against him, forfeit his right to a defense which the laws of God and man would otherwise have given him.



"If a man, for the purpose of bringing another into a quarrel, provokes him so that an affray is commenced, and the person causing the quarrel is overmatched, and to save himself from apparent danger he kills his adversary, he would be guilty of manslaughter, if not of murder, because the necessity, being of his own creating, shall not operate in his excuse.

"You are therefore to inquire whether this assault upon the defendant by the deceased was or was not by the procurement of the defendant; if it were, he cannot avail himself of the defense now set up for him.

"You have heard the whole story of the misunderstanding between the defendant and the father of the deceased. To call a man a coward, liar, and scoundrel in the public newspapers, and to call upon other printers to publish the same, is not justifiable under any circumstances, whatever.

"Such a publication is libelous in its very nature, as it necessarily excites to revenge and ill blood. Indeed, I believe a court of honor, if such existed, to settle disputes of this nature, would not justify such a proclamation as the one alluded to.

"Neither can I refrain from censuring the manager of the paper who admitted such a publication for so readily receiving and publishing what, in its very nature, would tend to disturb the public peace. But, gentlemen, it is one thing for a man to have done wrong, and another thing for that wrong to be of a nature to justify an attack upon his person. If personal wrong, done by the father of the deceased to the defendant, would not justify him in publishing a libel, neither would the libel have justified the deceased or his father in attacking the person of the author of the libel.

"No man can take vengeance into his own hands; he can use violence only in defense of his person. No words, however aggravating, no libel however scandalous, will authorize the suffering party to avenge himself by blows.

"If, therefore, the deceased's father—the object of the newspaper publication—would not be justified had he attacked the

defendant and beat him with a cane, still less would the circumstances have justified the unfortunate young man, who fell a victim to the most unhappy and ever to be lamented dispute.

"For, however a young and ardent son may find advocates in every generous breast for espousing his father's quarrel from motives of filial affection and just family pride, yet the same laws which govern the other parts of the case would have pronounced him guilty, had he lived to answer for the attack which was the cause of his death.

"The laws allow a son to aid his father, if beaten, and to protect him from a threatened felony or personal mischief, and in like cases a father may assist a son; and should a killing in either case take place it is excusable; but neither one nor the other can justify resorting to force to avenge an injury consisting in words, however opprobrious, or writing, however defamatory.

"Upon the whole, therefore, should you be of the opinion that the defendant, in order to avenge himself upon the father of the deceased, prepared himself with the deadly weapon which he afterwards used; went with a view to meet his adversary and expose himself to an attack in order that he might take advantage of and kill him; intending to resort to no other means of defense in case he should be overpowered, then there is no doubt the killing amounted to manslaughter. But, if from the evidence in the case you should believe that the defendant had no other view but to defend his life and person from an attack which he expected, without knowing from whom it was to come; that he did not purposely throw himself in the way of the attack, but was merely pursuing his lawful vocations, and that in fact he could not have saved himself otherwise than by the death of the assailant—then the killing was excusable, provided the circumstances of the attack would justify a reasonable apprehension of the harm which he would thus have a right to prevent. Of all this you are to judge and determine, having regard to the testimony of the witnesses who have given evidence to these several points.



"The last subject on which I shall trouble you is the address which has been so forcibly urged upon your minds by the counsel on one side, and as zealously and ably commented on by the other, touching the necessity of excluding all prejudices and prepossessions relative to this cause. I do not apprehend these observations were in any degree necessary, as I cannot bring my mind to feel that the verdict of twelve upright, intelligent jurors, selected by lot from the mass of their fellow citizens, will be founded on anything beside the law and evidence applicable to the case.

"Every person of this numerous assembly, let his own opinion of the merits of the case be as it may, must be satisfied of the fairness, regularity, and impartiality of the trial, up to the present period; and sure I am that nothing which is left to be done by you will impair the general character of the trial. If you discharge your duty conscientiously, as I have no doubt you will whether your verdict be popular or unpopular, you may defy the censure, as I know you would disregard the applause of the surrounding multitude.

"You, Gentlemen, will not be the first to violate the solemn oath you have taken and seek for a conviction or an acquittal of the defendant upon any other principle than those which the oath has sanctioned. And as I trust that in performing my duty I have conscientiously regarded that oath which obliges me 'faithfully and impartially to administer the laws according to my best skill and judgment,' so that in discharging yours, you will have due regard to that which imposes upon you the obligation, well and truly, to try the cause between the State and the defendant, according to law and the evidence which has been given you. . . ."

The jury returned a verdict of Not Guilty.