Washington University Law Review

Volume 1954 | Issue 4

1954

# Review of "It's Your Law," By Charles P. Curtis

Forrest M. Hemker

# BOOK REVIEWS

IT'S YOUR LAW. By Charles P. Curtis. Cambridge: The Harvard University Press, 1954. Pp. 178. $3.75.

The publisher aptly states that this book is neither a primer nor a treatise. Author Curtis says, "I have written lovingly about the Law. . . . I have tried to write about the most interesting things in the Law, because I think they are most likely to be the important things."[1] The things which to Mr. Curtis are interesting and important comprise a collection of four separate studies under his title *It's Your Law;* these topics are: The Advocate, The Lawyer, The Trial Court and Courts of Appeal.

None of these topics receive a conventional treatment. The Advocate originated as an article published in the *Stanford Law Review.*[2] It attracted considerable attention in legal circles. Mr. Curtis suggested that there are situations confronting a lawyer when he must "prefer his client to the truth, and if need be, to tell a lie";[3] that the lawyer's duty to his client is such that "he is required to treat outsiders as if they were barbarians and enemies."[4] He says:

> The upshot is that a man whose business it is to act for others finds himself, in his dealing on his client's behalf with outsiders, acting on a lower standard than he would if he were acting for himself, lower than any standard his client himself would be willing to act on, lower in fact than anyone on his own.
>
> . . .
>
> He is required to say things which he does not believe in.[5]

To so conduct oneself, Mr. Curtis writes, requires that the lawyer detach himself from his client. Says he, "Let him be a Christian if he choose, outside the practice of law, but in his relations with his clients, let him be a Stoic, for the better Stoic, the better lawyer."[6] This necessary detachment is to be achieved by treating the whole thing as a game or becoming an actor in a drama cast in a role in which the lawyer plays his part. In so doing the lawyer is said to practice a craft for the craft's sake, and if the craft is done sufficiently well, it may become an art. This detachment is not Christian;

> [n]or is the practice of law a characteristically Christian pursuit. The practice of law is vicarious, not altruistic, and the lawyer must go back of Christianity to Stoicism for the vicarious detachment which will permit him to serve his client.[7]

As might be expected, statements such as those quoted above did not go unchallenged. Henry S. Drinker, Chairman of the Committee on Professional Ethics of the American Bar Association, wrote a reply which was also printed in the *Stanford Law Review.*[8] The American Judicature Society, in the October 1952 issue, editorially stated:

> A LAWYER SHOULD NOT TELL LIES. Neither should a witness, a judge, a juror, a political candidate, a newspaper reporter, a salesman, a life insurance applicant, a taxpayer, a husband, nor a schoolboy.

---

1. Forward.
2. Curtis, *The Ethics of Advocacy,* 4 STAN. L. REV. 3 (1951).
3. pp. 16-17.
4. p. 8.
5. pp. 8, 17.
6. p. 34.
7. pp. 32-33
8. Drinker, *Some Remarks on Mr. Curtis' "The Ethics of Advocacy",* 4 STAN. L. REV. 349 (1952).

> We thought this had been settled ever since promulgation of the Ninth Commandment, if not since Eve's encounter with the serpent, but now we are told it is in dispute.
>
> In last month's *Bar Bulletin* of the New York County Lawyers Association is a reference to an article in last December's *Stanford Law Review* in which the statement is made that "I do not see why we should not come out roundly and say that one of the functions of a lawyer is to lie for his client." *The Bar Bulletin* quotes at length from that article, more briefly from a New York lawyer in reply to it, and presents the whole as a "sizzling controversy" within the legal profession. At least one newspaper, the *New York World-Telegram*, has followed with a news item that "the question of whether a lawyer may lie for a client had legal circles in something of a dither today."
>
> This we deny. The fact that one lawyer tells a lie, or says it is all right to do so, does not make a sizzling controversy among lawyers any more than one swallow makes a summer or one desertion means that the entire army is in a dither over whether to fight on or surrender.
>
> Bar associations all over the land have embarked upon extensive public relations programs, a chief object of which is to convince the man in the street that it is safe for him to trust a lawyer. What is to become of all this if we now tell the public that we cannot decide among ourselves whether or not a lawyer's word ought to be trustworthy?[9]

As one who violently disagrees with author Curtis' statements, in all fairness it must be said that one does not do justice to his treatment of his subject, The Advocate, by reducing it to the proposition as to whether or not in some imagined fact situation a lawyer may or must lie for a client. Curtis, by his imagined situations and the questions he propounds, employs the Socratic method perhaps to generate thinking respecting his main thesis, which is that there are shortcomings inherent in the adversary method of settling disputes. This thesis is by no means novel. Curtis poses hypothetical conflict of interest situations and ethical dilemmas with which a lawyer may be confronted under a legal system whereby he is allied with one side of a cause which he is duty bound to espouse to the annihilation of the other. He notes that under the adversary system the lawyer starts not in a search for abstract truth but rather to espouse legal or factual position with which he has allied himself in such a capacity and with an ethical loyalty so as to make it improper for him to give aid and comfort to the enemy. A non-adversary system for the determination of disputed fact questions with both lawyers duty bound to bring forward every witness, every document and every fact bearing upon the subject under inquiry to the end that the final truth be arrived at might well be more conducive to the administration of perfect justice. As yet such a system has not been devised and society has contented itself with the adversary system, however crude it may be when compared with perfection. One gets the impression from The Advocate part of Mr. Curtis' book that he does not speak as a reformer; he has no cause; he apparently is not trying to prove anything, but rather is toying with nice questions of ethics and proprieties which might vex the lawyer under the adversary system. Read by laymen, the subject thus treated will give a distorted image of what the practice of law is about and, indeed, a distorted view of how the courtroom lawyer conducts himself. The fact is that lawyers are seldom confronted with the dilemmas which Curtis propounds; the legal profession has been demonstrably successful in raising rather than lowering the standard of conduct of the market place, and the bar and the courts have been able to conduct litigation with honor and to satisfy society with the integrity of the judicial process. That one party to a litigation always loses does not demonstrate that one lawyer has allied himself with an unjust cause. Most litigated causes are honestly debatable. As has been

9. 36 J. AM. JUD. SOC'Y 68 (1952).

noted by the courts, many cases can go either way depending on the facts found by the jury. The system which permits a lawyer to proceed with cases believed to be proper for judicial determination has earned well deserved social acceptance. Abstract discussions of whether a lawyer can tell the sheriff the whereabouts of his client[10] and whether an unfavorable bit of evidence in a civil case must be offered in justice to the other side or the court under penalty of being false to the truth[11] are nice questions, but they so rarely come up that they constitute no problem to the practicing lawyer and certainly no pollution in the stream of truth and justice. One might as well speculate as to how a husband and father should act if, when fishing in the middle of a lake with his wife and only daughter, neither of whom could swim, the boat capsized and he had only the strength to save one—what choice should he make? The lawyer's fidelity to the truth is neither difficult nor burdensome. His ethical choices are not unlike the ethical choices of the non-professional member of society. The legal profession has not created a professional class with standards lower than a person acting for himself.

In the section entitled The Lawyer Mr. Curtis says:

> I tried to get at the lawyer as an advocate by way of the ethics of advocacy. I am going to get at the lawyer as legislator by way of the theory of the interpretation and its counterpart, the drafting of the legislation which, as I say, includes the legal documents which lawyers draft for their clients as well as statutes and administrative regulations.[12]

The Lawyer originated with an address which Mr. Curtis gave at the American Law Institute in St. Louis in September of 1949 and embraces a subject matter with respect to which Charles P. Curtis enjoys a well deserved reputation for thoughtful speaking and writing, namely, legal drafting. Here he demonstrates the shortcomings of the process of construction based upon a "search for the intention of the author."[13] He shows that this technique in certain fact situations leads to absurdities. He favors a different approach, which is thus described:

> All this is obvious enough, once we have got over prejudice for the precise, and are willing to recognize the equally admirable properties of selective and adjustable inexactitude. Then we shall be free to substitute for what the orthodox theory of interpretation calls the intention of the legislature, of the party to the contract, of the grantor, of the testator, the particular thing to which the word is applied by the person, whoever it may be, to whom the words were addressed and to whom the power of applying them was delegated.
>
> . . .
>
> The grave fault of the orthodox theory is that it assumes that the author retains control over his words after he has uttered them. How can he?
>
> . . .
>
> They mean, therefore, not what their author intended them to mean, or even what meaning he intended, or expected, reasonably or not, others to give them. They mean, in the first instance, what the person to whom they are addressed makes them mean.[14]

Had Secretary of Defense Charles E. Wilson told his famous kennel dog—bird dog story[15] before this section was written, Mr. Curtis would have had a current

---

10. pp. 13-14.
11. p. 17.
12. p. 44.
13. *Ibid.*
14. pp. 62, 63, 65.
15. On October 11, 1954, Secretary of Defense Charles E. Wilson, in a press conference in Detroit, Michigan, stated, while discussing unemployment and its relation to defense production:

> I've got a lot of sympathy for people where a sudden change catches 'em—but I've always liked bird dogs better than kennel-fed dogs . . . one who'll get out and hunt for food rather than sit on his fanny and yell.

This remark was assailed by members of the Democratic party, labor leaders and

and classic illustration of the correctness of his thesis that language means in the first instance what the person to whom it is addressed thinks it means.

In The Trial Court, author Curtis considers the trial court, the judge, the jury, and then ethics in the law generally. He has a conventional view of the judge as a person completely detached from all interest in either party or bias in favor of the government—detached even from himself and his predilections and beliefs. He observes that the trial court is concerned with competing versions of facts which are said to be

> rival claims which are put in the form of characterizations or versions of what happened. These versions of fact, much more than the facts themselves, are what the judicial process is dealing with. It is not the application of one kind of thing called law upon another kind of thing called fact. The bulk of a trial court's business is the choosing between two things of the same kind, the parties' conflicting and competing versions of what they can't deny.[16]

The jury, Mr. Curtis says, is the way the law extricates itself when it must solve problems beyond the law's experience; the law "washes its hands and asks the jury to see to it."[17] The jury is described as a group of functionaries deliberately not selected on the basis of skill or experience, unknown to each other, ignorant of the facts, strangers to the parties, having no interest in or prejudice about the case, denied time for careful study and analysis of the case and excused from giving reasons for its decision. Mr. Curtis concludes that the jury function is an act of evaluation and an emotional response. This he calls "intuitive law"[18] in the minds of men and notes that it is a strange companion to precision and reason usually thought of as the law.

Leaving the judge and jury, he delves into the relation of law to ethics and ethics in the law. Here he digs into logic, theology, philosophy and law. Ethics, he concludes, consists in conformation to patterns of behavior of persons whose opinion you regard with decent respect and that one's own standard of behavior is discernible by arriving at what others expect of us. The inculcation and accumulation of these intangibles are a part of our culture, a part of each individual, and merge into the legal order to constitute there an ethical influence not separable from the law. His final conclusion is that the determination of "right and wrong is social and cultural rather than individual and psychological."[19] The function of law, he says, is "not to make us virtuous, but to leave us free to be."[20]

Thus, The Trial Court consists more of observations respecting the philosophy of law than a discussion of trial courts as such. That this is the case may be due to the fact that Mr. Curtis drew material for this title from his articles on "Ethics in the Law,"[21] and "A Modern Supreme Court in a Modern World."[22]

The final topic, Courts of Appeal, contains further discussions relating to interpretations and meaning of language with particular reference to judicial construction and interpretation. At the outset he observes that justice exists in the particular case at the trial court level but that at the appellate court level it assumes a larger meaning where not only the particular case is involved but the effect of the particular case on the next case is an influencing factor. Using the bill of attainder cases and the religious education cases as illustrations, he makes

---

some Republicans. C.I.O. President Walter Reuther drew national attention to Wilson's remark and urged his ouster from office. See St. Louis Globe-Democrat, Oct. 12, 1954, p. 1, col. 3; St. Louis Post-Dispatch, Oct. 12, 1954, p. 1, col. 4.

16. p. 85.
17. p. 97.
18. p. 102.
19. p. 122.
20. p. 124.
21. 4 STAN. L. REV. 477 (1952).
22. 4 VAND. L. REV. 427 (1951).

two points. First, he says that a bill of attainder is a technical, legal phrase and in the decided cases was blown up "out of all legal recognition to meet an obvious moral necessity."[23] The religious education cases involved the phrase "an establishment of religion," which phrase, he says, has a plain and commonly understood meaning, which meaning, Curtis observes, the court "filled . . . up with experience, our experience."[24] Thus he again illustrates his view that language means as much what the reader thinks it does as what the writer intended.

In conclusion, this reviewer found Mr. Curtis' book interesting and well worth careful reading. He has ranged far and wide in his research and obviously has given much serious thought to the aspects of the judicial process of which he writes. The book would be difficult reading for the average layman and is thought provoking to the lawyer.

FORREST M. HEMKER†

---

23. p. 142.
24. *Ibid.*

† Lecturer on Profession of the Bar, Washington University School of Law.