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Abstract

The inferences contained in the above quotation explain why all trial court judges and trial lawyers should read Eyewitness Testimony.

KEYWORDS: testimony, eyewitness, loftus
I dissociate myself from the implication . . . that there is something insignificant or unreliable about a rape victim's observation during the crime of the facial features of her assailant when that observation lasts "only 10 to 15 seconds."

The inferences contained in the above quotation explain why all trial court judges and trial lawyers should read Eyewitness Testimony. As every law student soon learns, verdicts usually hinge on facts found by juries or judges after hearing witnesses testify as to what they have seen, heard, touched or smelled. One commonly pictures an "eyewitness" as the pedestrian on the street corner who saw two automobiles collide or the drug store clerk who was robbed at gunpoint. That jurors and judges place much weight on the testimony of such witnesses can scarcely be denied. As such, many prosecutors would agree that the persuasive value of a positive eyewitness is even greater than that of the proverbial "smoking gun."

Why, then, are so many lawyers and law students demonstratively ignorant of this important subject? Go to any busy courthouse and watch some trials. Sooner or later, you will observe the epitome of a poor eyewitness cross-examination. Assume the witness has identified the accused as the robber. The cross-examination must attack and destroy or at least neutralize the witness. Chances are this is how it might be done:

Lawyer: "You testified it was Mr. Jones who robbed your store."

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Witness: "Yes."
Lawyer: "Now, had you ever seen Mr. Jones before that night?"
Witness: "No."
Lawyer: "You didn't notice anything unusual about the robber when he entered your store?"
Witness: "Not really."
Lawyer: "You certainly didn't expect to be robbed, did you?"
Witness: "No."
Lawyer: "And you weren't particularly paying any attention to him before he pulled the gun."
Witness: "No."
Lawyer: "And this startled you?"
Witness: "Yes."
Lawyer: "And you wanted to do just what he told you?"
Witness: "Yes, of course. I wanted to get it over as fast as possible."
Lawyer: (flushed with victory in his grasp): "But, in spite of all this, you're sure the person you saw in the store that evening with the gun was my client, Mr. Jones?"
Witness: "Yes, I'll never forget his face."
Lawyer: (now fully deflated): "No further questions, your honor."

While the above cross-examination would probably not be considered bad if conducted by a fledgling third-year law student, few attorneys would say it accomplished its purposes. The attorney has scored some points, but how can he be certain the jury understands their significance? The witness has survived, and unless other evidence is produced, Jones will probably be convicted.

Criticism of the American legal profession for ignoring the psychological aspects of eyewitness testimony is not new. In 1909 John Henry Wigmore, the noted evidence scholar, demonstrated the legal profession's unfamiliarity with the available psychological literature. Wigmore's criticism took place under the guise of a fictitious libel suit

2. The last question and answer are the result of two shortcomings on the attorney's part. The first is a mistake in cross-examination technique, referred to as the "one question too many" syndrome. See Younger, A Letter in Which Cicero Lays Down the Ten Commandments of Cross-Examination, 3 Litigation 18 (Winter 1977). The second is the failure to understand that once a witness has testified to an event, it is extremely unlikely he/she will retract the statement.

3. Wigmore, Professor Muensterberg and the Psychology of Testimony, 3 Ill. L. Rev. 399 (1909).
brought by the American bar against Dr. Hugo Munsterberg for allegedly charging the law with ignoring what psychologists had recently discovered about the inaccuracy of eyewitness testimony. The bar wins damages of one dollar, but the judge's closing remarks indicate much truth existed in the defendant's claim.

It is impossible to claim that innocent people have not been the victims of miscarriages of justice. In 1932 Professor Edwin Borchard described sixty-five cases in which innocent people were convicted as a result of mistaken identification, circumstantial evidence (from which erroneous inferences were drawn), perjury, or some combination of these factors. Most startling of these convictions may have been that of Adolf Beck. Identified by ten witnesses as the man who defrauded them of jewelry, Beck was convicted in 1896, served five years in prison, and was wrongly charged again with the same offense in 1904. Fortunately, this time the police found the real swindler. Beck was subsequently pardoned on the earlier charge.

Aberrations of this nature are not a phenomena of the past. Recently the Minneapolis Tribune described the plight of Bruce T. Werner, who was jailed four months on a rape charge. As the story relates, "[w]hat happened to him is not supposed to happen in the criminal justice system, but it sometimes does. It is a classic case of mistaken identity." Werner did not match the victim's description, nor did he have the scratches she claimed to have inflicted on her assailant. He also passed a lie detector test; however, because he had been selected at a lineup, his prosecution and conviction seemed imminent. Fortunately, while Werner was in jail, the true rapist was apprehended and confessed to the crime. Both men were remarkably similar in appearance.

Psychologists have long known the dangers of eyewitness testimony. Unfortunately, however, few legal practitioners realize just how fragile such an identification can be. Why is this so? Perhaps a failure

4. For the full description of Professor Munsterberg's claim, see H. MUNSTERBERG, ON THE WITNESS STAND (1908).
5. E. BORCHARD, CONVICTING THE INNOCENT (1932).
6. Id. at 7-13.
8. The Minneapolis Tribune story includes photographs of Werner and the real assailant. As stated by one police officer in the article, "They'd pass for brothers." Id. § A at 9, col. 1.
of communications between the two disciplines is the answer. As recently stated,

[p]sychologists need to translate significant experiments (e.g., attribution and exchange or perception and cognition theory) into language available to the legal profession. For example, many legal problems related to eyewitness identification process suffer precisely because the psychological 'stuff' in perception or memory is simply not translated or made available in ways useful to lawyers.9

Likewise, much of the legal literature on eyewitness identification has centered on such legal doctrines as the sixth amendment right to counsel or the fourteenth amendment right to procedural due process without explaining how these rights relate to possible identification defects. Eyewitness Testimony, however, is instructive, for it begins, in language understandable to both lawyers and lay persons alike, the long overdue integration of knowledge between the legal and psychological professions.10

Professor Loftus begins her book with a discussion of how mistaken identifications may have contributed to miscarriages of justice in the past. After a brief description of the Sacco-Vanzetti murder trial and the role suggestive police identification procedures may have played in obtaining what was arguably a questionable conviction,11 Loftus discusses the Sawyer brothers’ case, from which one may reasonably conclude that the accused were innocent and their identifications erroneous.12 The author ends the chapter with the theme of the remain-

10. Besides EYEWITNESS TESTIMONY, Professor Loftus has authored numerous articles in psychological and quasi-legal periodicals. In a recent article, Loftus, The Eyewitness on Trial, 16 Trial 30 (October 1980), Loftus briefly summarizes many of the experiments and conclusions discussed in EYEWITNESS TESTIMONY.
12. In referring to the Sawyer Brothers case, Loftus makes a pointed comment on the legal system's inability to determine the actual frequency of wrongful convic-
der of her book: "[E]yewitness testimony is not always reliable. It can be flawed simply because of the normal and natural memory processes that occur whenever human beings acquire, retain, and attempt to retrieve information."\(^{13}\)

In chapter two, the author describes several studies relating the impact of eyewitness testimony on the jury's mind. One particular experiment, conducted by Loftus herself, is especially revealing. Three sets of fifty jurors each read accounts of a robbery and the evidence available to prove such. Without any eyewitness testimony, only eighteen percent of the jurors would have convicted the defendant. With one eyewitness, the conviction rate skyrocketed to seventy-two percent. Even when cross-examination showed the witness was not wearing glasses the day of the robbery, had only 20/400 vision and could not have seen the robber's face, astonishingly, sixty-eight percent of the jurors would still have reached a guilty verdict. The chapter also discusses those factors which lead juries to believe one eyewitness over another: e.g., witness likeability, motive to falsify, and powerful versus powerless speech.\(^{14}\) Loftus' conclusion, that "the way in which a witness gives testimony can affect the potential monetary award,"\(^{15}\) is instructive; for it indicates that attorneys may maximize their chances for success if they teach their witnesses the most effective ways to answer questions.\(^{16}\)

In the next three chapters, the book's heart, the author presents the results of her own as well as other experimenters' works. She demonstrates that memory is not a simple process, but is composed of three separate stages: perception, retention, and retrieval. Chapter three fo-

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13. Id. at 7.
14. According to Loftus, powerless speech has six possible characteristics: (1) frequent hedging, (2) rising intonation in declarative statements, (3) repetition, indicating insincerity, (4) intensifying adjectives, (5) empty adjectives, and (6) frequent quotation, indicating a deference to authority. Id. at 15.
15. Id. at 16.
16. Theodore Koskoff, past president of the American Trial Lawyers's Association, is a disciple of Professor Loftus's earlier work. Koskoff has suggested that trial lawyers consider Loftus's conclusions when conducting a direct examination. See Koskoff, The Language of Persuasion, 3 LITIGATION 27 (Summer 1977).
cuses on error at the perception stage. Two sets of factors, events factors and witness factors, affect the ability to perceive an event accurately. Among event factors are such items as exposure time, frequency of exposure, detail salience and the type of fact perceived. Loftus mentions that psychological studies have demonstrated that people overestimate the amount of time it takes for an event to transpire, and that the speed of automobiles is particularly difficult to judge; yet, the law of evidence permits witnesses to testify as to these events with little, if any, protective safeguards. 

Witness factors include such things as the stress which an event produces, expectations based upon personal and cultural prejudices, the activity engaged in by the witness while making an observation, and expectations as to what might be observed. Loftus disputes the notion that stress is usually a clarifying factor tending to remove distortion. She argues that one type of stress, weapon focus, is particularly intrusive on good perception: "The weapon appears to capture a good deal of the victim's attention, resulting in, among other things, a reduced ability to recall other details from the environment, to recall details about the assailant, and to recognize the assailant at a later time." 

Chapter four focuses on the retention stage of memory. Loftus concisely states the chapter's premise as follows: "Post event information can not only enhance existing memories but also change a witness's memory and even cause nonexistent details to become incorporated into a previously acquired memory." 

The author shows that suggestive questioning may not only enable a witness to remember what was forgotten, but can also introduce into the memory process, and ultimately courtroom testimony, facts or oc-

17. Estimates of speed are commonly allowed, if based on first hand observation. See Kotlikoff v. Master, 345 Pa. 258, 27 A.2d 35 (1942); Kelly v. Vuklich, 111 Kan. 199, 206 P. 894 (1922). The Federal Rules of Evidence allow opinions by lay witness if "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." Fed. R. Evid. 701. Arguably, jurors could be instructed that in considering a witness's testimony, they may, but are not required, to consider that people often overestimate the amount of time it takes for an event to occur. To this reviewer's knowledge, no jurisdiction has currently adopted such an instruction.

18. Loftus, supra note 12, at 35.

19. Id. at 55.
currences never before perceived. In one of her experiments, Loftus explains how a number of witnesses, after being subjected to a series of verbal suggestions, recalled a green car to be blue and a stop sign to be a yield sign. According to Loftus, non-verbal influences may also create distortions:

A police officer may tell a witness that a suspect has been caught and the witness should look at some photographs or come to view a lineup and make an identification. Even if the policeman does not explicitly mention a suspect, it is likely that the witness will believe he is being asked to identify a good suspect who will be one of the members of the lineup or set of photos. It is here that nonverbal as well as verbal suggestions can easily be communicated. If the officer should unintentionally stare a bit longer at the suspect, or change his tone of voice when [asking which number suspect it might be] the witness's opinion might be swayed.20

Two other aspects of retention seem especially dangerous: guessing by witnesses in identifications and the freezing effect such an identification may have. Loftus believes that in an honest effort to help, witnesses often guess at identification when not certain. Once such a tentative identification has been made, it grows stronger with time until it becomes absolutely positive. As such, a pre-trial identification or description of an event (e.g., at a preliminary hearing or deposition) may have such a freezing and reinforcing effect on a witness's memory as to preclude his/her ability to recollect the originally perceived event at the time of trial.21

Chapter five completes the discussion of the three-fold memory

20. Id. at 73-74.
21. Freezing of the memory process may occur in another way. After a witness makes what police consider to be an accurate identification, the police may later confirm the suspect's identification. The expected result will be that later in court, the witness will remember not only the crime and the subsequent identification, but also the police confirmation, thus attributing to an even more positive identification. Courts have refused to suppress identification testimony despite such police confirmations. See State v. Richie, 110 Ariz. 590, 521 P.2d 1136 (1974) (after picking out suspects from six photographs but prior to a preliminary hearing, the victim was advised by police that he had chosen the correct pictures, and that the defendant was already in custody); State v. Ponds, 227 Kan. 627, 608 P.2d 946 (1980) (detective's confirmation that victim correctly picked the defendant's photograph was "not suggestive since it followed the photo identification. . . "). Id. at __, 608 P.2d at 949.)
process by detailing problems in retrieving once stored information from a person's memory. Loftus maintains that the retrieval environment can have a major effect on the witness's power to recall. Although admitting it may be somewhat impractical, the author suggests that more accurate recollections would take place at the scene of the crime or accident, rather than at the police station, where identifications are commonly made. Evidently, placing the witness back at the scene of occurrence somehow serves as a jog to help recall once forgotten information. Loftus also suggests that the wording of questions may be extremely important. Examining three types of questions commonly used to interview witnesses, (narrative, controlled narrative and interrogatory), she recommends that to achieve the highest degree of both accuracy and completeness, interrogators should "let the witness tell the story in his own words, and when he has finished, then ask specific questions."22

The remaining and most interesting part of Eyewitness Testimony links these psychological findings to their effect on the legal system. Chapter seven deals with the inherent problems associated with the identification process and what can be done to remedy them. Two problems in recognition are particularly troublesome. Cross-racial identifications are shown to be highly inaccurate, even when a witness has had significant contact with the racial group of the identified person.23 Likewise, unconscious transference "in which a person seen in one situation is confused with or recalled as a person seen in a second situation,"24 can also lead to misidentifications. This problem is particularly associated with lineups. Loftus suggests that the real or functional size of a lineup may be less than the numbers of persons it actually contains. This occurs when the individuals in the lineup are dissimilar with respect to critical characteristics mentioned by the witness, as well as height, weight, race, and other common physical attributes. In addition, lineups may be photo-biased if they follow a photo-identification. "Almost invariably only one person is seen in both the photographs and the lineup. It is unlikely that a witness will identify in the lineup any-

22. LOFTUS, supra note 12, at 92.
23. This seems to hold true for all racial groups without exception.
24. LOFTUS, supra note 12, at 142.
one other than the person who was chosen from the photospread.” The chapter concludes by offering suggestions as to how attorneys can use psychological testing devices to determine the functional size of a lineup and whether photo-bias has occurred.

Chapter ten attempts to relate how the courts have unsuccessfully dealt with the problems inherent in eyewitness identifications. This chapter is probably the most important and interesting to the legal reader; however, for a variety of reasons, it is the most disappointing. Professor Loftus’ description of the current legal doctrines dealing with eyewitness identification is sometimes misleading, extremely simplistic, and, most discouragingly, incomplete.

The chapter begins with a discussion of the Wade-Gilbert-Stovall trilogy, in which the Supreme Court first addressed the problems associated with eyewitness identifications. Loftus correctly analyzes Stovall as dealing with eyewitness identification problems from a due process rather than a sixth amendment right to counsel approach. Also accurate, is her description of Wade and Gilbert, in which the Court held that if a line-up is conducted at a critical stage of the proceedings without defense counsel present, any subsequent in-court identification of the defendant by the witness is forbidden, unless the prosecution can show the witness’s identification has an “independent origin” apart from the line-up. Surprisingly, however, the author fails

25. *Id.* at 32.

26. Courts have utilized two constitutional doctrines in examining identification problems. The sixth amendment right to counsel guarantees the presence of counsel, absent waiver, whenever an accused is exhibited at a lineup or show-up during a “critical stage” of the criminal process. The due process clauses of the fifth and fourteenth amendments guard against suggestive identifications in general. The United States Supreme Court has three times employed the sixth amendment to suppress certain identification testimony. See United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Moore v. Illinois, 434 U.S. 220 (1977). It has applied the fourteenth amendment right to due process, however, only once in suppressing such testimony. See Stovall v. Denno, 388 U.S. 293 (1967). This suggests that as a practical matter, due process protections against erroneous identifications are more theoretical than actual.


28. *Stovall* declared a petitioner would be granted relief only if “the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law.” 388 U.S. at 301-02.
to question whether such an "independent origin" is psychologically possible, although her earlier discussion of retention and retrieval suggests that the line-up identification, rather than the identification made at the scene of the incident, may be what the witness is actually recalling.

Loftus errs, however, in stating that these cases (Wade, Gilbert, and Stovall) "apply only to those crimes where the police had to establish the identity of the perpetrator by means of photo identification, a showup . . . or a lineup . . . ." 29 Wade and Gilbert both dealt with lineups, and Stovall dealt with a one person showup in a hospital room where the victim was being treated, but none of these cases dealt with photographic identifications.

Perhaps two reasons explain Professor Loftus' error. First, while both Wade and Gilbert analyzed the problems of eyewitness identification under a sixth amendment right to counsel approach, Stovall examined the same issues under a due process clause analysis. By discussing these cases together, the author has mixed two legal doctrines and their applicability. Secondly, although Professor Loftus separates the two doctrines later in her discussion, she fails to mention United States v. Ash, 30 in which the Court held that "the sixth amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the offender." 31

Loftus must also be criticized for concluding her discussion of the sixth amendment cases with Kirby v. Illinois. 32 In that case, it was found that a suspect in a robbery case did not have the right to have counsel present at a stationhouse showup because he had not yet been indicted and was thus not in a critical stage of the proceedings. Initially, many courts believed Kirby made "indictment" a magic word in a sixth amendment right to counsel analysis. As Loftus points out, after Kirby, police delayed in indicting defendants so that lineups could be conducted without defense counsel present. However, in 1977, the

29. Loftus, supra note 12, at 180.
31. Id. at 321. Ash recognized that even though the sixth amendment did not apply to photographic identifications, due process violations could still exist, requiring the suppression of eyewitness testimony.
Court clarified *Kirby* in *Moore v. Illinois*. Moore was identified at a preliminary hearing after the victim had signed a formal complaint against him. The state argued that because Moore had not yet been indicted, he had no right to have counsel present at the hearing. Justice Powell, however, declared that “[s]uch a reading cannot be squared with *Kirby* itself, which held that an accused’s rights under *Wade* and *Gilbert* attach to identifications conducted at or after the initiation of adversary judicial criminal proceedings, by way of formal charge [or] preliminary hearing.” Thus, since *Moore*, the right to counsel under the sixth amendment has been determined not by whether one has been indicted, but by whether adversary judicial proceedings have begun. Why the author fails to recognize this is somewhat perplexing: Loftus ends her discussion of the due process identification cases with *Manson v. Brathwaite*, decided the same year as *Moore*; and *Moore* was decided in 1977, long before *Eyewitness Testimony* was published! For whatever reason *Moore* was not addressed, the discussion suffers from its absence.

The remainder of chapter ten examines four methods of guarding against mistaken identification: excluding unreliable eyewitness identification, requiring corroboration before a conviction can be based on eyewitness testimony, giving cautionary jury instructions, and allowing expert psychological testimony on the reliability of eyewitness identifications. Loftus dismisses the first two suggestions as having too many problems, but states that the third does not go far enough. She believes cautionary instructions do “not supply the jury with any information that it can use in the task of evaluating the reliability of any

34. *Id.* at 228 (quoted in *Kirby v. Illinois*, 406 U.S. at 689).

Professor Loftus cannot be criticized for failing to anticipate these developments. However, these cases point out the need for frequent revisions of *Eyewitness Testimony*. 

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particular eyewitness account and wonders whether the instructions, themselves, may be so complicated as to preclude their comprehension by the jury.

Loftus believes that allowing expert testimony is the best safeguard. The remainder of her book is devoted to building a case for its use. Loftus freely admits that expert testimony may lead to some procedural problems, such as a potential battle of experts, but argues that it is the best alternative available. To illustrate its use, she devotes the final chapter to discussing an actual murder case in which she testified as an expert and offers an edited version of her testimony to the reader in an eighteen page appendix.

Why read Eyewitness Testimony? Several reasons have already been presented. For the concerned citizen, law student, or judge, it contains a wealth of information. For the police, it should suggest ways to minimize incorrect identifications. For the lawyer, it will suggest better ways to present direct testimony and attack eyewitness identifications in criminal cases. Some prosecutors may cringe at the effect an increased understanding of this subject matter may have on the conviction rate, but considering the benefits which may inure to society in reducing the number of unjust convictions, such is really in the public interest. Discounting a few shortcomings in her legal discussion, Loftus has done an admirable job of presenting, in a readable fashion, information about this most significant subject. Hopefully, other writers will follow in her footsteps. Likewise, if the legal system is truly concerned with the administration of justice, many of Eyewitness Testimony's criticisms and suggestions should be seriously considered.

As Ephraim Tutt said, "The lawyer no more than his client can forget the past." Maybe not, but with the help of Eyewitness Testimony we can learn from it and prevent its repetition.

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37. Loftus, supra note 12, at 190.
38. The Federal Rules of Evidence provide a means of dealing with this problem by allowing the court to appoint experts where appropriate. Fed. R. Evid. 706.
Seldom, if ever, can a judge have aroused so much popular acknowledgment in his time as the author of this book, Lord Denning.¹

¹ D.S.O.; M.A., Pembroke College, Oxford, 1932; Visiting Professor of Law, Valparaiso University, School of Law.

This review is, in part, a response to Professor Michael Richmond's review of Lord Denning's book published at 4 Nova L.J. 327 (1980). Both reviews were selected for publication in the JOURNAL to accommodate the classic scholarly tradition of discussion and debate. Of Professor Richmond's review, Mr. Powell had this to say: "It was with great interest and admiration that I read the review by Michael Richmond of Lord Denning's 'The Discipline of Law.' It is unusually talented and perceptive. Yet I disagree with what I conceive to be his main conclusions, I ask myself why should this be so?

The answer is in my different experiences with Lord Denning's work, and in my understanding of the law's usefulness to society. For much the greater part of my life, I was a legal practitioner in England where Lord Denning's decisions had effect, and, quite apart from any reaction of mine to these, I believe that the hope of any advanced society in legal practice and theory is to be found not in its courts and judges, but in the 'constructive practitioner.' By that I mean a lawyer who keeps his client advised well in advance of the client's activities: whether in the boardroom, or in designing trusts and wills, or in drawing a commercial agreement, or in making the best of the margin of activities permitted by the Internal Revenue or Anti-Trust Acts. For the constructive lawyer, a measure of certainty and stability in his legal system is essential. Whatever the benefits expected to flow from Lord Denning's activities and reforms, certainty and stability are not among them. I have tried to express these notions more fully in this review of my own, which condenses the reactions of almost a professional lifetime exposed to Lord Denning's concepts.”

Certainly Lord Denning has done some unusual things in his time—quite apart from his decisions. Having been made a Judge of the High Court of Justice in 1944, he became a Lord Justice of Appeal in 1948. Lord Denning continued occasionally to take cases at first instance (that is, not on appeal) to keep his hand in as a trial judge. He became a Lord of Appeal in Ordinary in 1957 but in 1962 demoted himself, as it were, to the Court of Appeal, and became Master of the Rolls to give himself more work. He became 82 years of age on January 23, 1981.

Yet in spite of Lord Denning's remarkable record, his enormous gift for work, his scholarship, and his quite unusual command of the English language, there is a section of lawyers who have some reserva-

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2. The Lords of Appeal in Ordinary are the legal judges of the House of Lords, which constitute the final court of appeal in Great Britain. An appeal in civil cases from County Courts and the High Courts of Justice, and in criminal cases from the Crown Courts, lies to the Court of Appeal and then to the House of Lords. See 1 EUROPA, YEAR BOOK 1980, at 1358 (1980).

3. David Walker in The Oxford Companion of Law 816 (1980) defines Master of the Rolls as follows:

The office probably originated in the Chancery clerk whose duty was to oversee the scribes who composed the Chancellor's Roll. In the Middle Ages, the title was Clerk or Curator of the Rolls, and he was one of the Masters in Chancery who assisted and acted for the Chancellor.

With the development of Chancery jurisdiction, the judicial duties of the Masters in Chancery increased and a large part of these fell on the Master of the Rolls; as early as the mid-sixteenth century he was sometimes called vice-chancellor, and some jurisdiction was delegated to him by special commission. By the early seventeenth century, he heard causes in the absence of the Chancellor and became the Chancellor's general deputy.

In 1729, it was provided that all orders made by the Master of the Rolls should be valid, subject to an appeal of the Lord Chancellor, and thereafter he sat regularly as a Chancery judge. In 1833, his jurisdiction was extended and it was enacted that he should sit continuously, but his orders were subject to appeal to the Lord Chancellor and after 1851 to the Court of Appeal in Chancery. He could also, and frequently did, sit in the Court of Appeal in Chancery.

Since 1875, the Master of the Rolls has been President of the Court of Appeal. Until 1958 he had the general responsibility for the public records (a responsibility then transferred to the Lord Chancellor) and is still responsible for the records of the Chancery of England.

The Master of the Rolls also has certain duties relating to Solicitors of the Supreme Court.
tions. They are exemplified by the struggling British lawyers who practiced the law during Lord Denning's judicial career. After World War II, many lawyers returned to practice after some seven years in the fighting services. Those who had practices before the war found that their connections had disappeared and that they were returning to a business and professional life which, whatever lip-service it might pay, found it inconvenient and uncomfortable to have them back in a world which had succeeded in doing without them. These lawyers most often came back without a business, without clients, money or a starting-point—except the necessity of taking a refresher course in ordinary professional law. Their present was bleak; their future worse than uncertain. Imagine the dismay of most of them when they read of the decision, in the depths of their general discomfiture, given by Lord Denning in Central London Property Trust Ltd. v. High Trees House Ltd. Had the doctrine of consideration ceased suddenly to exist, after the early mastery of it followed lately by its reaffirmation in refresher courses? Had it not also been learned that judges were supposed to be even stricter than students in observing principles of law which had

4. In England, an attorney is either a barrister or solicitor.

Barrister is the term used in England and Wales since the 15th Century and in countries with legal systems modelled on that of England for a person who has been called to the Bar, i.e. admitted to practice in the Superior Courts and entitled [in those courts] to represent a party to a cause in court. ** The work within the ordinary scope of a Barrister's practice is advising on questions of law, drafting pleadings, conveyances, and other legal documents, and advocacy in court. Barristers have exclusive rights of audience in the Superior Courts and in inferior courts, concurrent rights of audience with solicitors. When appearing in court, counsel [barristers] wear wigs, gown, and bands. 

* Id. at 115-16.

In contrast, a solicitor is a person trained in the law who prepares cases from beginning to end, drafts briefs to barristers to appear in court, sometimes drafts pleadings, consults with and carries on without exception all the business of the law. Whether connected with the courts or general practice, only a solicitor can deal with the public, run a business office, and move freely through the law's business: "[Solicitors] are not members of the bar and are not heard in the superior courts; and the power of admitting them to practice, and striking them off the roll, has not been given the Inns of Court;" but to their professional body, the law society. As to the barrister/solicitor distinction in America, see, Ballentine's Law Dictionary 1193 (3d ed. 1969), see e.g., In re Ricker, 66 N.H. 207, 9 A. 559 (1890).

been firmly established by precedent over the centuries? It already was difficult enough to advise clients constructively on what they should, and should not, do. Was one now to tell them that one simply did not know what the law was; could not even hazard a forecast because a judge could apparently decide what he liked quite arbitrarily? They were hard days for war-weary, war-torn lawyers and morale was none too high. Lord Denning's decision certainly did nothing to raise it.

The value of The Discipline of Law and, it may be said, of Lord Denning's judicial career, altogether depends upon the view taken as to the ways in which, and the principles on which, judges may properly, in the words of the publisher's note, "mould and shape the principles of law laid down by the judges in the 19th century to meet the needs and opinions of today."

So much depends on this and the personal element involved in a wide judgment of the issues, that it is worth starting from a classical source for serious assessment.

Sir Henry Maine in his Ancient Law\(^7\) writes:

With respect to that great portion of our legal system which is enshrined in cases and recorded in Law Reports, we habitually employ a double language, and entertain, as it would appear, a double and inconsistent set of ideas. When a group of facts come before our English court for adjudication, the whole course of discussion between the judge and the advocates assumes that no question is, or can be raised which will call for the application of any principles but old ones, or of any distinctions but such as have long since been allowed. It is taken absolutely for granted that there is somewhere a rule of known law which will cover the facts of the dispute now litigated, and that if such a rule be not discovered, it is only that the necessary patience, knowledge, or acumen is not forthcoming to detect it. Yet the moment the judgment has been rendered and reported, we slide unconsciously or unavowedly into a new language and a new train of thought. We now admit that the decision has modified the law. The rules applicable have—to use the very inaccurate expression sometimes employed—become more elastic; in fact, they have been changed. A clear addition has been made to the precedents, and the canon of law elicited by comparing the precedents is not the same as that which would have been obtained if the series of cases had been curtailed by a single

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7. SIR H. MAINE, ANCIENT LAW 35 (1908).
example.

In commenting on this passage William Geldart writes in *Elements of English Law*:

I think that neither of these views is the whole truth . . . . In the absence of clear precedents which might govern a question, we find judges relying on such considerations as the opinions of legal writers, the practice of conveyancers, the law of other modern countries, the Roman Law, principles of "natural justice" or public policy. The proper application of these may be a matter of dispute or difficulty but in any case the judge is applying a standard; he shows that he is *not free to decide*, as a legislator would be, as he pleases; he is bound to decide according to principle.

There is much more in the same vein making it clear beyond any doubt that judges are not given the authority to usurp the functions of the legislature. Further support is to be found, if it were needed, in "Palm Tree Justice in the Court of Appeal," an article written by Dr. Morris of Magdalen College, Oxford. Dr. Morris wrote this after the decision, *In Re Jebb*, where the court including Lord Denning held that 'child' meant "adopted child." Dr. Morris went on to criticize:

By departing from the established rules of law the Court of Appeal seems to have usurped the functions of the legislature. The decision will require the rewriting of the whole of the chapter on gifts to children in the text-book on wills, unless the editor has the courage to say that it is manifestly wrong . . . . It is submitted that rules of law binding on the court cannot be evaded merely by calling them technical.

Clearly, Dr. Morris and the somewhat disillusioned lawyer returning from the wars had something in common with their feelings for judges who engaged in holy wars about what the law ought to be. In these days the legislators have quite enough to do and say in this field. "Palm Tree Justice" has a very real meaning for those who exper-

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ienced the days of the British Empire. It brought to mind a young Dis-
trict Officer sitting under a palm tree in a trackless, sun-scorched de-
sert trying to decide a dispute between two nomadic tribes about a well
which produced a few drops of water less than once a year. He is prob-
ably little trained in law but, in his way, has to act as a judge in mat-
ters important to those around him. Soon he finds that the arguments
concern systems of law of which he has no knowledge and date back to
the days of the Prophet Mohammed. He has lost his way in a morass of
words and, possibly, non-applicable laws. What shall he do? Why,
of course, give a commonsense decision based on what he considers fair.
That is palm tree justice and a very good form of justice in primitive
conditions. Lawyers do not really care which system prevails—but
please let them know which it is to be. And all know, in their hearts,
that a sophisticated, industrialised, highly social system needs a stable
rule of law so that men do not wait to pick up the pieces when some-
thing has gone wrong but are advised on, and conform to, the law as it
is known at the time of their actions.

Primitive society may well need mainly advocates, courts and
judges: but civilization does not. It needs the constructive legal adviser
at hand in the board room, the Ministry or the testator's study. Thus
the course of action proposed can be tested against the law's require-
ments and trouble—particularly litigious trouble—avoided by good in-
terpretation and judgment. Without that sort of law civilization cannot
properly survive—but it could—and in some ways does by turning over
its disputes to Ministry officials. In Lord Denning's own words, "I
would simply ask: Which method is to be preferred?" 12

This is a book about Lord Denning, for Lord Denning, by Lord
Denning. That is not to decry it or to suggest that it is anything but
extremely readable to the lawyer. It is beautifully written and full of
vitality for those who like to picture the fast-changing face of the law
in the hands of its judges. It is also, up to a point, a modest book. But
there are undoubtedly, also, glimpses of self-deification:

"My protest carried some weight with Lord Radcliffe. He had the
best mind of anyone of his time." 13

12. DENNING, supra note 6, at 4.
13. Id. at 14.
“It was argued by Mr. Robert Fortune on the one side . . . and Mr. Ronald Hopkins on the other, a sound and sensible advocate. They argued it well but they had not the reserves at their command as I had. I delivered judgment straight off the reel with a tidying up afterwards for the Law Reports.”

“This time I had a good common lawyer sitting with me, Winn, L.J., and a Chancery lawyer who was endowed with unusual common-sense, Danchwerts, L.J.”

The book is forthrightly claimed to be an account of the author’s personal contribution (no false modesty here) to the changing face of English law in this century. Thus, it leaves no margin for any reflections that it may be a dispassionate and impartial commentary on changes of that sort. It is a personal account of a Mein Kampf of a very individual sort (for a judge) and—as has been suggested before—none the worse for that as readable material.

The seven main parts or fields of law in which it is suggested that Lord Denning has made contributions towards marked changes are: the construction of documents; misuse of ministerial powers; locus standi; abuse of “Group” powers; high Trees; negligence and the doctrine of precedent.

Dealing with the construction of documents—one of the longer and, it is submitted, most interesting parts—Lord Denning summarizes the progress (as he sees it) with statutes, wills and other unilateral documents and contracts. It is reasonable, perhaps, in a work admittedly written with a personal bias to omit here and there an argument contrary to the admitted bias. Yet, in this respect, Lord Denning does seem to go much further than necessary or desirable in discussing attitudes in the construction of wills.

The developed lines of argument centre around (and this is something of an over-simplification of the complexities) the question whether it is only the words the testator has used which may be construed or whether the construction may be applied to the intention of the testator in a broader measure. The authority for the traditional view—that only the words which the testator has actually used may be

14. *Id.* at 12.
15. *Id.* at 27. By such comments Lord Denning appears to be saying: I usually have very inferior intellects with me?
The fundamental rule in construing the language of a will is to put on the words used the meaning which having regard to the terms of the will, the testator intended. The question is not, of course, what the testator meant to do when he made his will, but what the written words he uses mean in the particular case—what are the expressed intentions of the testator. 18

Certainly, there is nowadays another view, expressed so freely and clearly by Lord Denning for example, *In re Jebb* 19 in which he refers contemptuously to “technical rules [which] have only too often led the court astray . . .” 20 This other view lays down unequivocally that technical rules may be rejected and that the court must look to see simply what the testator intended. Lord Denning went on to say:

*Looking at this will in the light of the surrounding circumstances* it seems to me quite plain that when the testator spoke of the “child or children of my said daughter” his intention was to refer to the adopted child, Roderick, or any further adopted children that she might have. 21

What Lord Denning significantly omits is the background of the older view which explains it. The point is that legislation requires certain formalities which must accompany the expression of testamentary intentions. A leading example of this sort of formality is that the will must be in writing. So far as it is not in writing there is no will to construe and, in consequence, it was ordinarily felt in the past—and still is by most lawyers—that regard may be paid only to the words used by the testator and embodied in the form prescribed by the statute to the exclusion of any intention to be found otherwise than in the formal requirements.

A reference to this basis for the traditional view might have been

18. Id. at ___, [1943] All E.R. at 190 (emphasis supplied).
20. DENNING, supra note 6, at 27.
21. Id. (emphasis supplied).
just mentioned—indeed should have been—when the author leaves the subject of wills with this passing appearance of fairness:

So I leave the subject with this question: Are we to construe wills according to their grammatical construction as propounded in previous cases? Or are we to mould them in accordance with the intention of the testator in the particular case, irrespective of earlier precedents?  

If the question is to be asked after reasonable enquiry surely the enquiry should necessarily include a not unreasonable argument over a century old. Principles and arguments in support of it are not necessarily wrong because they are old; nor are they necessarily right because they are new. There are times when Lord Denning hardly seems to accept this but to believe that anything new is good and all that is old is bad.

Aside from this questionable omission, this part, so far as it deals with contracts, at any rate, is recommended reading for any serious student of the law of contract. So also is the part dealing with negligence—so far as concerns the student of the law of torts. Both—and this applies to the whole book—are beautifully written in elegant English, full of scholarship and yet easy to read. The point is not whether Lord Denning has some great talents and gifts—for these he most certainly possesses—but rather whether he makes a proper use of these great qualities.

Of all the developments in 20th century jurisprudence, insofar as development can be attributed to judges, Lord Denning suggests that their greatest contribution is in the law of negligence. He refers to the old forms of action from which the rules of law were derived. Many lawyers consider that too little is known about these forms of action today and that a greater understanding of them might well have its advantages. Not so, naturally, Lord Denning. He has condemned them in court and writes here that they were "old and technical [always a bad word with Lord Denning] and expressed in Norman-French." Many words and phrases still are so expressed in English common law, and Norman-French was the language of the King's Courts—although not always of reports—until about the Restoration in 1660. In any

22. Id. at 31.
23. Id. at 227.
event, the rules formulated by the judges of the 19th Century about duties in tort, Lord Denning tells us, did not satisfy the social necessities and social opinions of the 20th Century. No time is spent on discussing whether the opinions and necessities of the 1970's are really better than those of the 1870's—some might beg leave to doubt it—but it is certainly true that we swept on in 1932 to the tort of negligence as an independent wrong.

It is highly informative to read of the dissenting judgment in Candler v. Crane, Christmas & Co.,\textsuperscript{24} and its approval fifteen years later by the House of Lords in Hedley Byrne & Co., Ltd. v. Heller & Partners Ltd.\textsuperscript{25} as told by the inventor of the particular duty of care outlined in those two cases. Lord Denning writes:

[I] return to the sequel to Candler v. Crane, Christmas & Co. It came about in a case which has become as famous as Donoghue v. Stevenson (1952) A.C. 562. It was Hedley Byrne & Co., Ltd. v. Heller & Partners Ltd. Whereas Donoghue v. Stevenson dealt with negligent acts Hedley Byrne dealt with negligent statements. I was invited to sit in the Lords on the appeal, but I knew that my dissenting judgment in Candler would come under review. So I declined . . . The merchant bankers (Heller & Partners) had headed their report “without responsibility.” On that account they were held not liable. But the House of Lords, in a series of obiter dicta, considered the decision in Candler. I was gratified to find that they approved of my dissent and gave reasoning on the same lines. They held that a professional man was liable for negligent statements when he knew they were going to be acted upon; and they were acted upon. I will not pause here to quote from their judgments. Their influence will be apparent from the succeeding cases. (i.e. Rondel v. Worsley (1967) I Q.B. 443; Saif Ali v. Sidney Mitchell (1978) 3 W.L.R. 849; Dorset Yacht Co. v. Home Office (1969) 2 Q. B. 412 and Anns v. Merton Borough Council (1977) 2 W.L.R. 1024).\textsuperscript{26}

The whole story of the aftermath of Hedley Byrne is not told here—the speculations, the worries and the wild ideas. They still exist, however, and form one of the leading difficulties in the law of torts throughout the Commonwealth and not only in the United Kingdom. Many law-

\textsuperscript{24} [1951] 2 K.B. 164.
\textsuperscript{25} [1964] A.C. 465.
\textsuperscript{26} DENNING, supra note 6, at 245.
yers seem to think that the line of reasoning developed in these cases is a sort of catch-all, in the sense that any form of wrong, if it does not fit in neatly under some approved heading of liability, will at least be caught by Hedley Byrne. Has it all been worth while starting this particular hare which every lawyer now has to chase some of his time? It is a little too early, it seems, to say with conviction that Hedley Byrne, approving the dissent in the Candler case, has truly on balance played an altogether happy part in the development of common law. As events have occurred, might it not have been better if either the new principles had been put firmly into words in legislation? Or, if the House of Lords were really going to spend all the time they did on obiter dicta in Hedley Byrne, might they not profitably have done a little bit more to be specific about the exact nature of the duty they had in mind?

Further mandatory reading is suggested by part five, which deals with the High Trees case. This was again very much one of the many inspirations of the Master of the Rolls. Lord Denning deliberately asks: did it abolish consideration? And, to reply, Lord Denning quotes himself at length in Combe v. Combe27 which, unfortunately, lawyers did not have before them when this dreadful question arose—now, it seems, so long ago. Combe v. Combe dealt with a case where a husband, through his solicitor, undertook to pay his divorced wife one hundred pounds a year free of tax. He did not pay; presumably since she had an income bigger than his. The wife sued the husband six years later, for six hundred pounds in arrears. The judge at first instance thought he should apply the principle of High Trees. The Court of Appeal, however, with Lord Denning, declined to extend the principle in this way. Lord Denning said:

Much as I am inclined to favour the principle stated in the High Trees case, it is important that it should not be stretched too far, lest it should be endangered. That principle does not create new causes of action where none existed before. It only prevents a party from insisting upon his strict legal rights when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties. . . .

Seeing that the principle never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that

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is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind. Its ill-effects have been largely mitigated of late, but it still remains a cardinal necessity of the formation of a contract, though not of its modification or discharge. I fear that it was my failure to make this clear which misled the judge in the present case. He held that the wife could sue on the husband's promise as a separate and independent cause of action by itself, although, as he held, there was no consideration for it. That is not correct. The wife can only enforce it if there was consideration for it. That is, therefore, the real question in the case; was there sufficient consideration to support the promise?²⁸

The mental processes in reaching the implementation of this particular kind of lawmaking are, as revealed by Lord Denning, quite fascinating. They can be traced frequently in the pages of this book and there follows a summary of the processes preparatory to the High Trees decision itself. In October 1922, Lord Denning became a pupil in chambers at No. 4 Brick Court, Temple and soon after he started came, apparently, upon a pathway which led to the High Trees case. In his commercial work one important factor seemed to him that a contract for the sale of goods of ten pounds or more in value had to be in writing. Another important factor was that no promise was binding without consideration for it. There was considerable resort to subtlety to defeat these rules which young Denning considered unjust.

While still a pupil Denning was influenced by Hartley v. Haymans²⁹ and noted it in pencil on his Anson's Contract, adding, "Suggest estoppel." In the Hartley case, Mr. Justice McCardie reviewed many authorities and made reference to Hughes v. Metropolitan Railway Co.,³⁰ which had been overlooked for half a century. Hughes and Birmingham District Land Co. v. London and North-Western Railway Co.,³¹ led Lord Denning along his pathway, but he found many obstacles en route. Two particular obstacles were that estoppel applies only in respect of representations of fact³² and that a representation, in or-

²⁸. Denning, supra note 6, at 207 (citing Combe v. Combe).
²⁹. [1920] 3 K.B. 475.
³⁰. [1877] 2 A.C. 439.
der to work an estoppel, must be one of fact and not of law. Lord Denning writes:

In order to leap these fences I needed a good horse. It turned up. It was the Report of the Law Revision Committee on the Doctrine of Consideration. It came out of 1937 when I was in very busy practice as a junior. I had no time to read it then. [But he read it later in life and found that] . . . it exposed the injustice of the rule that estoppel only applies to statements of fact, and of the rule that payment of a lesser sum is no consideration for the discharge of a larger sum. The Committee recommended the abolition of both those rules. They made this recommendation. It got me over the fences which obstructed the way to *High Trees.*

Another step in his path was a case in which he was engaged as a King's Counsel—*Marquess of Salisbury v. Gilmore.* However, in this case, Lord Justice Mackinnon found the fences "too high for him" since he considered the division of the House of Lords in *Jordan v. Money* to be binding on the Court of Appeal—not an unreasonable conclusion for a judge. Not so Lord Denning, who, four years later, saw his chance in *High Trees.* Quoting his very thin line of authority, Lord Denning says simply: "In my opinion, the time has come for the validity of such a promise (a promise intended to be binding, intended to be acted upon and in fact acted on) to be recognized." *Fiat Justitia* and the law has been changed to what Lord Denning always thought it should be since his early days in chambers as a pupil. Can that really be the way to make law?

The advice given in *The Discipline of Law* is on surer ground when aspirants for the legal profession are told to learn properly the tools of the trade: good English, with a full command of it, both written and spoken; be well-groomed and neatly dressed; have a pleasing voice; show respect. Lord Denning certainly does not even hint at this, but are

33. *DENNING,* supra note 6, at 202.
37. *DENNING,* supra note 6, at 205.
not a good impression, a good voice and, if possible a little charm
equally important with, if not more so than, all the legal authorities in
the world? In convincing a judge you are dealing with a human being
who, surely, is as susceptible to human qualities as to professional skills
and knowledge and perhaps more susceptible.

All in all, The Discipline at Law is a book to read with pleasure
and instruction if you are really, really keen on the law. Some of us
prefer our law a bit watered down with other draughts of life. Maybe
those who cannot find the law wholly sufficient in itself do not have a
vocation—only a profession. Denning says: “I sit in court every day of
the week. Five days a week. I spend my weekends writing reserved
judgments.” We are again reminded of the importance and majesty
of the law. Those of us who are less committed will have to bear with
our shortcomings and extraneous pleasures with all the cheerfulness we
can find.

Two more sources throw light on the real difficulty of assessing the
value of this sort of book—and this sort of principle. It is not easy to
separate the two things. If you believe in the aims and objects of Lord
Denning you automatically believe much more in what he writes in The
Discipline of Law.

Mr. Jonathan Sumption writing in the Sunday Telegraph in a re-
view of another legal work, The Judge by Patrick Devlin writes:

[J]udges have such immense power that it seems to social reformers a
tragedy that they cannot use it to propel the law in the “right” direction.
What those well-intentioned enthusiasts really want is the enlightened
despoticism of some 18th-Century German princes and most 20th-Century
Socialists; a despotism administered by the only people in a liberal soci-
ety who have the power to command and enforce instant obedience,
namely the judiciary.

The great power of the judges would, however, be intolerable if it were
not used in accordance with settled principles. Judicial power is not des-
potic precisely because it is bound (not hidebound) by a body of law
which appears stable and permanent, greater than the individuals who
administer it.

38. Id. at 316.
39. LORD DEVLIN, THE JUDGE (1979). Lord Devlin is a former Lord of Appeal
in Ordinary.
If we must be ruled by laws and not men it is important that the law should change only at a stately pace, receiving new ideas slowly and from sources other than the whim of individual judges. It is for parliament, juries, lay arbitrators and the like to inject change into the system, not judges. For them conservatism is not an unavoidable vice but the supreme judicial virtue. 40

Or finally and even more appealingly, comes a profound *cri de coeur:* from Miss Frances J. Sieber: 41

Sir,
With the greatest respect to the Master of the Rolls, would his lordship kindly refrain from changing any more laws before the law examination in August.

Yours truly
Frances Jane Sieber
As from 1st year, College of Law.

40. ___ *The Sunday Telegraph* (London) ___ ( ).