CHAPTER 1

Introduction: Scope of Lectures—Use of Language in Law

SUBJECT MATTER AND METHOD

Sec. 1—01. Purposes and program. The general purpose of these lectures is to furnish you, who are beginning the study of law, with an over-all view of the legal system and with certain general notions of the way it operates.* This purpose is not unlike that which is served in the field of economics by an introductory textbook on that subject. In

* (I.R.) General Bibliography. The following items are suggested for further reading. It is not recommended that the beginner read anything beyond the text of these lectures until after he has completed the first year of legal study.

Dewey, John, How We Think, Boston, D. C. Heath & Co. (1933).
Frank, Jerome, Law and the Modern Mind, New York, Brentano's (1930).
Fuller, Lon L., The Law in Quest of Itself, Chicago, Foundation Press, (1940).
our legal system and how it operates
this sense these lectures might properly have carried the title, *Introduction to the Study of Law.*

But different kinds of introduction are possible. In treating law or any other subject matter, different features may be studied, different aspects marked out for special consideration. I shall start with the legal system as a going concern, as an operating mechanism; and put about equal stress on its structure and its functioning.2 My two main objectives will be to show you how the legal system is put together and what makes it tick; or, if I may borrow a comparison from medicine, to give you a combined anatomical and physiological treatment of the law. And I have sought to suggest

Holmes, Oliver W., Collected Legal Papers, New York, Harcourt, Brace (1920).
Llewellyn, Karl N., The Bramble Bush (1930); republished with an additional chapter, New York, Oceana Publications (1950).
Pound, Roscoe, Introduction to the Philosophy of Law, New Haven, Yale Univ. Press (1922).
Radin, Max, The Law and Mr. Smith, Indianapolis, Bobbs-Merrill Co. (1938).
Radin, Max, Law as Logic and Experience, New Haven, Yale Univ. Press (1940).

In addition to the above general bibliography the reader’s attention is directed to special lists of suggested reading appended to various sections below.

2 The reasons for this choice of subject matter have been stated in the Preface; the justification for it will, I hope, be made out by what follows.
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in the title, Our Legal System and How It Operates, something of this twofold emphasis.³

Our discussion will be confined to the typical American legal system—the system which one finds in any of the states in the United States.⁴ We are not going to embark on a consideration of law in general or legal systems in general. This would take us too far afield and cover too much ground. Legal systems vary with differing forms of political organization. They vary with changing social conditions. Law has a different character in Russia from what it has in the United States; it is not quite the same in nature in France or in Italy or even in England as it is here. Sufficient unto the day are the difficulties and peculiarities of our own system. It is strongly colored by the American constitutional system and by American social conditions. Its study will require us to take account of American governmental organization and of characteristic American attitudes. We shall be especially interested in the ways in which our peculiar constitutional organization and our attitudes affect the making, the enforcement, the application, and the interpretation of law.

In courses such as Contracts, Property, Torts, Criminal Law, Procedure, Equity, Constitutional Law, and Business Associations, you will examine specific parts of our law; you will treat the detailed rules, methods, and problems of limited fields. By contrast, in the present course we shall examine together certain processes which characterize the

³ Other adequate and accurate titles would have been Introduction to Legal Method and Introduction to Legal Processes. My objection to these titles, and reason for rejecting them, was that they are more abstract, and therefore less familiar and suggestive to the ordinary reader than the title which I have chosen.

⁴ Hereafter I shall refer sometimes to the American legal system and sometimes to American legal systems in the plural. By the American legal system I shall mean the legal organization characteristic of all the states in this country. When I use the plural I mean to stress the peculiarities of each state’s law and legal organization; there are differences as one passes from state to state, but in the main our interest centers on the features of likeness common to all.
American legal system and cut across lines between specific fields. These are the processes by which the behavior of persons are controlled, the processes by which law is made and formulated, the processes by which law is applied and interpreted, and the processes by which controversies among persons are adjudicated. The discussion of these various processes should give you a perspective of the legal system as an operating whole and an understanding of the functioning of its parts.

In order to lay before you our general program, I cannot do better than to give the titles of the chapters which will follow, and append a word of explanation as to each and a list of subtopics to be covered.

Chapter 1. *Introduction: Scope of Lectures—Use of Language in Law*—This chapter will be devoted, after a few more preliminary remarks about the subject matter and method of our course, to a discussion of the role of communication in the operation of the legal system.

Subtopics: Subject Matter and Method
Place of Language in Legal Work

Chapter 2. *Standards for the Individual's Acts*—The standards which are prescribed by the lawgiver, to guide the acts of the individual, are to be the chief subject of discussion in this chapter.

Subtopics: Standards for Acts
Significance of Standard Acts
Effectuation of Standards
Uses of Standards to Guide Action

Chapter 3. *Standards for Official Acts*—This chapter will deal with various official acts and the standards applicable to them, in particular with executive acts and with the processes of criminal prosecution and civil action.
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Subtopics: Official Acts and Their Significance
Effectuation of Standards for Officials
Use of Standards for Officials

Chapter 4. Legislation—In this chapter the processes of creating explicit standards of all types will be dealt with, as well as the significance of these standards in various respects.

Subtopics: The Legislative Process
Standards for the Lawmaker
Subsidiary Lawmaking
Lawmaker’s Statement of Standards
Significance of Legislation

Chapter 5. Interpretation of Legislation—In this chapter, the need for interpretation of standards and the resources and methods of the interpreter, will be treated under the following subheads:

Subtopics: Role of Interpreter
Sources and Standards of Interpretation
Typical Interpretive Problems

Chapter 6. The Common Law—This chapter will deal with the case law and the ways in which it is created and changed; it will cover among other items the doctrine of precedent.

Subtopics: The Creation of Law by Decisions

Chapter 7. Legal Policies and Policy Making—The subject matter of discussion here will be the policies of the state and law; the chapter will furnish an inventory of the major policies of government today.

Subtopics: Policies Regarding the Individual
Policies Regarding the Community
Policies Regarding Organized Groups
Determinants of Policies
Sec. 1–02. Is this course practical? No one of you needs to be "sold" on the importance of a course in Contracts or a course in Property. Some of you may also perceive right off the value of a course such as we are embarking on. But some of you, like many Americans and Englishmen, have a strongly developed feeling of suspicion, or at least of doubt, about matters theoretical; you may react uneasily to my suggestion of a program for this course. In fact, the list of chapter titles may sound somewhat abstract, and accentuate your feeling of doubt. I hasten to say that I sympathize with your feeling up to a certain point, and that I wholly endorse the demand for the practical. I am just as much irked as any of you may be, by sterile academic discussions of theories that have no relation to the work of the lawyer, and I am just as determined as any of you might be to cut my cloth to the practical pattern.

But the practical-minded individual is sometimes prone to go even further than a doubt about theory; he may assume tacitly that the general or theoretical is necessarily opposed to the practical and is, therefore, to be rejected by the practical man. I remember hearing, when I was a student many years ago, some young fellows tell of an excursion through the "red-light district" in Detroit. According to their story, they entered a certain house of prostitution and created a "rough-house"; the "madam" in charge quelled the disturbance and said she would have them know she was running a "decent house." To one who starts with the assumption that theory and practice are opposed, the suggestion that a study of legal processes has practical value may sound like

1 The list of chapter titles has been included because I felt that it would be helpful to give you a quick, though dim, glimpse of our course as a whole. I hesitated to do this for the very reason suggested in the text. The titles probably sound to you more abstract than the material which they represent will be found to be. Partly they sound abstract because they stand for unfamiliar material; on this basis the chapter titles in a casebook on Torts or Crimes also have an abstract ring.
a contradiction of similar character. But the assumption of an opposition is quite untenable, as I shall show in a moment. It is an assumption and never explicit opinion. It is an assumption only made by the unthinking. No one who stops to think things out ever expressly adopts this position.

Why, then, should theory and practice ever be assumed to be opposed? The blame for this perverse assumption has lain on both sides. Too much theorizing has been of a useless character, theorizing for its own sake, theorizing unchecked by practice. A good deal of legal theorizing has been of this character—"pretty poor stuff"—as Justice Holmes called it. And such theorizing has tended to give all theoretical activity a bad name and to make the practical-minded person look upon all of it as irrelevant and idle. On the other side, the assumed opposition between theory and practice has been fostered by a superficial view of men of action: they are in a hurry to get things done or at least to get to the task of doing. They want to learn how to do things and not spend time in discussing how they are done. What they fail to realize is that all important activities are reduced to standard methods and that the minimum "know-how" which they seek to obtain is nothing but theory under another name.

Actually, theory and practice are essential to one another and cannot be separated. On this, all thinkers and writers of today would agree. Practice is essential to prevent theory from becoming mere dreaming, essential to bring and hold it down to earth, so to speak. But theory represents the general ideas which organize experience. Theory is essential to good practice. Without general ideas to bring phenomena together, man would be forever floundering in a morass of particular experiences; he would not see the forest for the trees. To use another figure, general ideas are like the compass and the map which enable the traveler to traverse the forest without losing his way.
You will not penetrate far into the legal forest before you sense its endless variety and complexity. You will start grasping for means of putting things together. The multitude of rules is quite overwhelming, and the variety of fact situations which can arise is infinite. You will soon come to realize that you cannot memorize all of the rules, and you cannot possibly foresee all the bewildering array of fact situations to which your stock of rules may become applicable. You will learn that the most you can do is “to learn to think like a lawyer.” You will find that the way to get about in the legal forest is not to memorize the characteristics of the particular trees but to develop methods of laying out and blazing paths. You will discover that the way to increase your grasp of the law is not to remember particular cases and how they were decided, but to develop an understanding of the methods of deciding them, of the broader principles on which they were determined. In the course on Contracts you will lay out paths through a part of the law; in the course on Property, paths through another part. In this course, I am trying to provide you with a larger legal map which will enable you to see the forest all together and to recognize the paths by which to pass from one part of it to another.

Justice Holmes has spoken regarding the importance of legal theory in the following terms:

"We have too little theory in the law rather than too much. . . . Theory is the most important part of the dogma of the law, as the architect is the most important man who takes part in the building of a house. The most important improvements of the last twenty-five years are improvements in theory. It is not to be feared as unpractical, for, to the competent, it simply means going to the bottom of the subject. For the incompetent, it sometimes is true, as has been

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2 This and other quotations from Holmes found in this section are taken from his epoch-making essay, "The Path of the Law," 10 Harv. L. Rev. 457 (1897).
said, that an interest in general ideas means an absence of particular knowledge. . . . The danger is that the able and practical minded should look with indifference or distrust upon ideas the connection of which with their business is remote."

It is important to notice, apropos of Justice Holmes' last remark about remoteness of theory, that this is not a course in Jurisprudence. Our chosen field of discussion is not remote from the work of the lawyer. The study of the structures and processes of the American legal system is as closely related to the practice of American law as are the study of anatomy and the study of physiology to the practice of medicine. Anatomy and physiology represent aggregates of theories regarding the structure and functioning of the human body. Without these general ideas the physician could not treat a disorder in a particular area, such as the stomach, intelligently. His thinking would not go beyond that of the layman who thinks of the stomach as a thing by itself and who can only deal with such a phenomenon as an acid stomach as an isolated affair to be relieved by some such immediate remedy as the administration of baking soda. The physician sees his problem in its wider relations. He asks what causes this acid condition: a temporary situation such as nervous overstrain or an eating spree? Or a more serious and continuing disturbance of gastro-intestinal functions? And what can be done about it, beyond providing a temporary palliative? Obviously, the doctor cannot analyze his case in this way without an ample fund of theories about bodily structures and functions. And the position of the lawyer is no different. He must understand the structure and functioning of the legal body if he wants to work effectively as a lawyer. He may learn how to draw a simple deed or contract—some stenographers and realtors can do this—but he will not be a successful draftsman and will not be able to take care of difficult problems of drafting without an adequate grasp
of legal policies and legal ways and means. He may learn how to look up the law and write a brief on a legal point, but he will not be able to present hard and novel cases properly unless he has a real appreciation of the judicial process, of how judges work, of how they reach and how they justify their conclusions. He may learn to apply clear and unambiguous statutes to simple cases, but he is not prepared to deal with statutes which raise doubts and difficulties of application, without a comprehension of the processes by which statutes are made and the methods by which they are interpreted. In short, an understanding of the basic legal processes is essential, if one expects to be a legal architect rather than a legal mechanic, fit to do only routine jobs.

In conclusion, regarding the practical value of our course, I shall only add that I have tried to select material and problems which have importance to the lawyer. I accept the test of practical value, for theorizing as well as for other forms of activity. I can not demonstrate here and now that I have always made successful choices. To do this would require me to rehearse everything that is to be covered in the course. A large part of the proof of the pudding will be in the eating. But, as a token of my sincerity of purpose, I shall welcome at any time such questions from you as: "What relation does this topic in our course have to a lawyer's work?" "Why are we discussing this problem or that?" I not only regard such questions as proper; I feel that you should be propounding them constantly; and I shall do my best to give satisfactory answers if you cannot find answers for yourselves.³

Sec. 1-03. Material and method of study. A few words of explanation are in order, before we start on our main

³ If some teacher finds it impossible to guess why I included this or that, he can either skip it with a profane reflection on the author, or write a letter to inquire.
undertaking, relative to the form of the material contained in these lectures, the organization of the material, and the use which you are expected to make of it.

The major part of the material here presented was originally delivered orally in traditional lecture style. I have retained the personal forms of address—"you," "we," and "I," which are common in lectures—because they make the text less formal and easier to read. However I have put the text itself in printed form, so that you can go over it before class and as often as you find necessary. This saves classroom time and allows you to prepare properly. When the class begins I shall assume that you are already familiar with the text, and shall conduct the discussion on the basis of this assumption.

After you have studied the text, devote an ample amount of time to the problems and queries stated for your consideration. These will be the principal subject matter for discussion in class and should be carefully weighed and answered beforehand. They are intended to give you an opportunity to apply the general statements made in the text. There is no way of developing appreciation of the meaning of general statements, comparable to actual exercise in their application.

What I aim to do in this course, as all the teachers in the law school aim to do, is to stimulate you to think in legal terms. I want you to develop an inquiring mind as regards all legal problems. Formulate your own opinions about what you read. Ask yourself, "Is that so, and Why?" Cultivate an "I'm from Missouri" attitude. Read critically, not passively. I do not want to give you exercise in memorizing a picture of the legal system. I do want you to understand the system, and understanding is an achievement. If you succeed in understanding, whatever needs to be remembered will stick without any special effort in that regard.
Sec. 1-04. Lawyer uses language. The man of the law works with language at every turn. Whether he be lawmaker, practitioner, judge, or scholar, his every move requires communication. Now he is using language in drafting a statute; now in framing a deed, will, contract, or pleading; now in eliciting the testimony of witnesses or making an argument to the jury; now in instructing the jury or issuing an order; now in writing or reading an opinion; now in reporting a case or referring to a case already reported; now in interpreting a statute; now in preparing and writing a treatise or article on some special branch of the law. As one educator remarks, "The law appears—at least to a layman like myself—to be a highly verbal profession." And another author writing recently observes half facetiously:

"When Hamlet was asked by Polonius what he read he made the oft-quoted response, 'Words, words, words.' The reply would have been equally apt if the old man had asked him for a definition of the law. The painter works with a great palette of colors, the etcher with lines and lights and

1 I speak here of the legislator as a lawyer, for, while many members of our legislatures are not lawyers, almost all drafting is done by lawyers or passes their critical scrutiny. For our purpose this means that all the language used in statutes can be treated as language chosen or used by lawyers.

2 The remark is made by Professor Crawford in discussing the kind of tests necessary for measuring legal aptitude. His statement continues:

"Ability on the part of the lawyer to express what his client intends to express in terms which are unequivocal and which, throughout as long as may be necessary, will be distinctly understood by others, necessitates a mastery of language on his part. This in turn demands a highly developed and precise use of words. Therefore, the test itself (legal aptitude test) is largely composed of verbal material and measures ability to use words in connection with such mental processes and problems as involve analysis, analogies, and the application of general principles to specific questions. By this means we attempt to measure not only the level of an individual's potential ability; but also whether he can use that ability in the way a law student is expected to do. We have found that mathematical and scientific thinking or the three-dimensional thinking required of the engineer is quite different from that which is related to this ability for legal studies." "Use of Legal Aptitude Test in Admitting Applicants to Law School," 1 BAR EXAMINER 151 at 154 (1932).
shadows, the musician with majestic chords or lilting melodies, but the lawgiver must confine himself to words, words, words.

"Words, words, words. The legislator puts his law into words. To know the law, the populace must know the meaning of those words. If words had an exact meaning legal troubles would end instead of beginning at this point. But since few if any words have exact meanings, being among the most slippery and evasive inventions of man, courts must be set up to interpret the words of the lawgiver and tell the puzzled populace—by means of more words—what the lawgivers mean by the words their laws make use of. And then, with many more words, the lawyers try to help the courts in their quest of truth by calling attention to previous words used by that and other courts in the interpretation of words of a like nature promulgated by lawgivers at some earlier time in even more words, words, words." 3

In view of his almost continuous use of language, you will readily see how the man who labors in the vineyard of the law needs to give careful attention to the communicative process. As well might the medical student omit to consider the nature of available medicines and surgical instruments as for the prospective lawyer to fail to scrutinize his verbal tools and to learn about the uses to which they may be put.

Sec. 1-05. Communication analyzed in terms of verbal acts. The common man is accustomed to take the communicative process wholly for granted; he does not try to analyze it. It is like the air he breathes; he uses it constantly; yet never notices its character, its limitations, or its defects. When some important feature of the communicative process is called to his attention, he is in about the same condition as M. Jourdain in Molière's play, who was surprised to learn that all his life he had been speaking prose. 1 The result of


1 This reference to M. Jourdain has become a commonplace of late. So far as I can discover, Bentham was the first to refer to this example. See Works (Bowring's ed.) VIII, 122 (1843).
this lack of analysis is that the common man—and I might add, some of his more learned brethren, too—is forever dogged by a horde of verbal monsters, some prehistoric and many mythical. He is plagued by many needless verbal puzzles which vanish when the communicative process is broken down and its functions are understood. As Cardinal Newman has well said:

"Half the controversies in the world are verbal ones, and, could they be brought to a plain issue, they would be brought to a prompt termination. Parties engaged in them would perceive, either that in substance they agreed together, or that their difference was one of first principles. . . . When men understand what each other mean, they see, for the most part, that controversy is either superfluous or hopeless."  

Accordingly I shall begin with the assumption that communication is not the simple, single process that it is usually supposed to be; and our first job will be to subject it to further analysis.

Communication, like legal control, can be analyzed in terms of human acts; and this is the mode of analysis which I shall adopt in regard to both. This will bring out the functional aspect of communication as it will the operative side of the law. It will have the advantage, too, of reducing the process of communication and the process of legal control to common terms: acts. And since legal control is almost wholly exerted through words, this is an important point.

Each communicative act, each use of language, I shall call a verbal act. This expression is shorter than "use of language" and has the virtue of emphasizing the fact that each use is an act. "Verbal act" will be employed, accordingly, in a very general sense to include every distinct use of language, spoken or written, and to include every use of language whether small or comprehensive. The sudden cry of "Fire" is a verbal

2 Oxford University Sermons 200.
act in this sense; as is the statement, "It's a fine day today," and the command of a father to his small son, "Willie, get my pipe." A letter is a verbal act and so is a speech. In the legal realm, the question put orally to a witness is a verbal act, and the response elicited from the witness is also such an act. In the same class fall written transactions such as contracts, deeds, and wills. Likewise, the passage of a statute is a verbal act, and the rendering of a judgment or an opinion in a lawsuit. And finally, the production of a large and important treatise such as a lawbook must also be regarded as a verbal act. Each of these acts represents, according to common understanding, a separate and distinct type of activity. Each of them bears a specific type name in ordinary speech and usage. Each of them represents a separate and distinguishable use of language. In these respects each of these acts meets the specifications of our definition of verbal act.

Sec. 1–06. Parties to communication. Communication may begin and end with a statement by a speaker, S. He uses language in a verbal act; he addresses his act to a hearer, H. It is in this sense that we speak of S’s act as communicative. But the verbal act of S may originate in a question by H which calls for an answer, or S’s use of language may be sandwiched into an extended series of diverse statements such as a conversation. And the roles of speaker and hearer are constantly shifting. Everyone is now speaker, now hearer. The specific role of an individual in any protracted body of discourse changes from moment to moment.

Moreover, communication need not occur in a simple one-one exchange between a speaker and a hearer as it does in the ordinary face-to-face conversation. Quite often the par-

1 Henceforth S will be used to indicate speaker; H to indicate hearer. These two parties will be taken to typify the parties in communication. Either may represent a plural meaning though the singular form be used. And speakers will be understood to include writers, and hearers to include readers.
participants in discourse are numerous. The speaker may share his role with several or many persons. Thus the members of the legislature speak as a group when they enact a statute. And S may address his message to large, indefinite and mixed groups of hearers. An orator may address a large audience; a writer may address his book to an indefinite audience; and a witness tells his story for the benefit of a mixed audience including judge, jury, parties, attorneys, miscellaneous onlookers, and perhaps finally an appellate court. Nevertheless, effective analysis requires simplification of material, and except where some complex situation needs to be indicated, I shall treat communication as if it were merely a two-party affair in which S meets H face-to-face to transmit a message.

Sec. 1-07. Speaker's purposes. The speaker may act verbally for many reasons. His purposes for speaking or writing may be as varied as his purposes for any other kinds of activity. He may intend to influence the behavior of other persons whom he addresses; he may want to impart information; he may seek to obtain information; he may aim to make a prediction, and so on. In the following discussion, I shall divide the speaker's purposes into two main kinds and subdivide each kind into further types:

1. The purpose to control others (sec. 1-08);
2. The purpose to give or obtain information (sec. 1-11).

1 Associate and expressive uses of language. To make our discussion complete we ought to consider at least two more functions of language, but as these two functions have very little relation to legal work, I shall dispose of them with a brief reference.

Language may be used as Dewey says "to enter into more intimate sociable relations" with others. This kind of use is illustrated by the type of conversation which frequently goes on between persons who have nothing in particular to say. Thus, A says to B, "It is a fine day," and B answers, "Yes, very fine." For all practical purposes these remarks have no other meaning than "Let's talk." A great deal of our waking time and conversation consists of such interchanges of remarks, designed to keep up social contact, or to maintain "phatic communion," as Malinowski calls it.

Language may also be used to express one's feelings. Everyday expressive uses are found in exclamations of pain, joy, surprise, and so forth. The expres-
Sec. 1–08. Directive acts. Verbal acts are done by S to control others, to influence their activity, to give them directions as to what he wants them to do or not to do. S's act may vary in tenor from a blunt command to a mild request or even an expressed desire for action. When a father says to his son, "Willie, get my pipe," or "Willie, don't make so much noise," he is making a directive use of language. He undertakes to control Willie's behavior by an order. But control of behavior is no less attempted when Willie pleads with his father for a soda.

In law, frequent and important use of directive acts is made. Indeed verbal acts of this sort constitute the primary and basic legal uses of language, i.e., to control and influence people. These legal uses range all the way from the unqualified mandates of statute and judicial order to requests and petitions, as where a litigant requests relief from a judge and where a group of citizens petitions the legislature for the enactment of desired legislation.

Sometimes directive acts are very narrow and specific. A particular speaker may address a particular hearer and tell him just what to do. This kind of situation is exemplified by the case already mentioned where the father directs Willie to get his pipe. Similar specific orders also find a place in the operation of the legal system; specific directions are given by specific officials to specific individuals directing them to do or to refrain from doing specific acts. For example, the policeman may order the speeding motorist to "Pull over to the curb"; or a judge may issue an order to his bailiff to eject a particular person from the courtroom; or the judge may command the defendant in a case which he has heard, to do or to refrain from doing certain acts.

Sive use of language is especially important in the field of art; it is represented by the employment of language in poetry, song, and drama, though in all these uses the expression of feeling is always coupled with the purpose to influence others or to convey information to some extent.
But some directives are *general* in character and scope, and these are the most important for our present purpose. They are the directives which fix general standards of behavior: laws, rules, regulations, principles and doctrines. Among them are general or natural principles such as principles of morality, which appear among us without the stamp of enactment by any particular authority. Others, such as the Ten Commandments, appear as the mandates of a Divine Legislator. Others are the declared rules or policies of such particular groups as labor unions, e.g., not to cross a picket line. And finally, there are the standards of behavior in which we are primarily interested, the general directives which we call in the aggregate, *law*. These are the rules, regulations, principles, and doctrines promulgated for the guidance of individuals and officials by various organs of the state.

Speakers who issue general directives and the hearers who receive them are often far removed from one another in time and place. An outstanding instance of this sort is the enactment of legislation. The speaker in this situation is an official agency endowed with authority to declare standards of behavior, a lawmaker.¹ He promulgates directions and addresses them to a distant and indefinite group of persons. He usually "speaks his piece" at a place far from most of the persons to be controlled; he acts at the state capitol, and his message is transmitted through various channels until it reaches the members of the group to which it is directed. And the members of this group are not only not named by individual or proper names, they are usually addressed as "anyone who" and constitute a fluctuating and changing group. Moreover, the legislative message is always put in permanent, i.e., written or printed, form. The lawmaker's verbal act is intended to exert a continuing influence. You and I receive

¹ The lawmaker may also issue specific orders such as the command of the father to Willie. He may, for example, order a particular official to make a certain payment. Compare sec. 1–10, problem 6.
today the legislative mandates of lawmakers who spoke a century or even several centuries ago.

Sec. 1–09. Distinguish control by force and by verbal acts. Lumley, a well-known sociologist, divides the methods employed in social control into two: 1. the physical force method, and 2. the symbol method. Physical force has to be used in the control of inanimate objects. It may also be used in the control of human beings; in fact, there are some situations in which physical force is the only feasible means of controlling them. Thus, a mother has to employ physical force when she wishes her small child to have a bath. She has no choice but to pick up the child, carry it to the tub, and do the scrubbing. In like manner, legal control of behavior may sometimes have to be exerted through physical force; the policeman may have to restrain the violent acts of a wrongdoer by physical suppression.

The symbol method, on the other hand, involves the use of language or other symbols to induce or deter acts of the person controlled. When the child is old enough, it can be told to take a bath. When the individual can read he can be directed by published rules to do or not to do certain acts. The symbol method represents a great saving in the energy of persons who exercise control and causes much less social friction than the use of physical force. Legal control is almost wholly symbolic; it employs words, and words belong to that most important of all symbol systems, language. The standards of the law are stated exclusively, as I have already pointed out, in verbal form; and most official acts which are done in the effectuation of legal standards are verbal acts.

Sec. 1–10. Problems. 1. Suppose a city installs a traffic light on one of its streets for the purpose of regulating the movement of vehicles and pedestrians. Which of the two methods of control does this involve?

1 Means of Social Control 14 et seq. (1925).
2. Suppose a policeman gives a driver a ticket for a traffic violation which directs him to appear in police court at a specific time to answer the violation charged. Which of the two methods is employed?

3. Suppose that a policeman arrests a man for an act of physical violence on the street and conducts him to the police station. Is this an instance of symbolic control or control by physical force?

4. A law provides that persons are obliged to appear and testify regarding matters pending in court whenever they are summoned for this purpose by a formal subpoena issued by the court. What type of directive verbal act is represented by this law?

5. A court issues a subpoena under the law aforesaid requiring W to appear and testify regarding matters involved in a lawsuit between P and D. What type of directive is involved here?

6. In 1531 there occurred in England a number of deaths by poisoning, afterwards known as the Lambeth Poisonings. These were traced to food served by the Bishop of Rochester. The English Parliament, having apparently satisfied itself that the Bishop’s cook, Richard Roose, had wantonly put poison in a vessel of yeast, passed an act declaring that Roose and any other poisoner be adjudged a traitor and be executed by being boiled to death. Roose was accordingly boiled at Smithfield a few days after the act was passed.¹ What type or types of directive act were involved in this Act of Parliament?

Sec. 1–11. Informative acts. Man, like other animals, learns by direct experience. This is his original mode of obtaining information. Beginning as an infant each individual uses eyes, ears, and other sense organs to inform himself regarding his surroundings, animate and inanimate. And man

¹ Fay, Hanged by a Comma 77 (1937).
has the faculty of speech, a faculty which other animals do not have; this faculty opens up to him another mode of obtaining information. Without speech, organic life is individual and detached; experience remains the property of the organism which has it. Learning must be direct, and education is nonexistent. By the use of language the speaker can transmit reports of his experiences and, what is important for our immediate purpose, the hearer can share in the experiences of the speaker. Every human being, as speaker, transmits information of his experiences in this manner. Every human being, as hearer, receives an even larger amount of information regarding the experiences of others. The primary advantage is on the side of the hearer. The area of his contacts with the world is widened. He transcends the immediate limits of his senses. He has verbal experience of many things beyond the range of direct observation. Through S's verbal report, H can hear about the plan which S is now entertaining, and view the fight that S saw last year. He can learn of the opinion expressed by Lord Coke centuries ago regarding the natural rights of Englishmen. All these are matters which can be reported to H by speech, orally or in writing, but which could not be directly perceived by him.

Informative verbal acts may be divided into two main kinds: those by which information is imparted and those by which it is obtained. The first kind will need to be subdivided into several subtypes.

Three subtypes of verbal act impart information about specific situations. First may be mentioned the statement of present fact. S says to H, "It is raining outside." Similarly the bailiff tells the judge that a witness is waiting to be called; or the defendant's lawyer writes to the plaintiff's lawyer to say that the defendant is willing to make a settlement. Second, the informative act may concern a past occurrence and may properly be called a narrative use of language. S tells
about a historical event or about a previous happening in his personal experience as where a witness relates what he saw at the scene of a crime. Third, S may make a prediction of a future occurrence. He may foretell a specific future event and in this sense make a predictive or prophetic use of language. S says it is going to rain tomorrow, or he prophesies a bad end for X; the attorney tells his client that he expects the judge to decide their case in favor of the other side. These three subtypes of informative act are sufficiently familiar and call for no further comment.

A fourth, and very important, informative use of language is represented by the general assertion. This is a summation of experience, either of the speaker’s personal experience or of experience which has been reported to him by others. The general assertion may be a simple summation in popular terms of the result of common experience, observations of natural phenomena, “Water runs down hill,” or reports regarding typical human behavior, “Every man has his price.” Or such assertion may be worked out and formulated on the basis of systematic and carefully controlled observation in the form of what we call scientific laws. Boyle’s Law regarding the relation of pressure and volume of gases and Newton’s Law of Gravitation are assertions of this scientific kind. These two laws relate to natural phenomena. But scientific assertions may also be made regarding human behavior; they express the observed constancies of habit and reaction among human beings. The construction of these generalizations constitutes the main objective of the modern sciences of psychology and sociology. In the legal field we encounter not a few generalizations regarding the behavior of individuals and officials and their reaction to the methods and processes of legal regulation. Whether these generalizations deserve the scientific

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1 This does not necessarily mean that the speaker uses the future tense. Predictions often take the form of a statement of present expectation or of present purpose to act. And, of course, predictions like assertions may be general as well as specific.
label or whether they are still on the level of common expe-
rience, we need not decide. In any case, we are constantly
using and developing generalizations regarding the course of
legal affairs.

The general assertion refers to common or scientific knowl-
dge and not to a specific event. In this respect it differs from
the specific informative acts first mentioned. But a general
assertion like any other may be made by a particular speaker
to a particular hearer on a particular occasion. Thus S may
say to H on a particular occasion, “Every man has his price.”
The information transmitted is general and so is the asser-
tion; but the communicative act is particular. Similarly, in a
lawsuit in which a patient is suing a doctor for malpractice and
is claiming that the fracture of his leg was not treated prop-
erly, another doctor may testify regarding approved medical
procedures in treating fractures. He may say that good prac-
tice requires that the doctor take X-rays in case of known or
suspected fracture. This statement about approved practice is
a general assertion, and yet it is made on a particular occasion.
It is to be used along with proof that the defendant doctor
set the plaintiff’s fracture without taking an X-ray (a spe-
cific occurrence) to establish the defendant’s negligence and
the plaintiff’s right to recover.

However the general assertion does not have to be ad-
dressed to a particular hearer. Like the general directive
referred to in section 1–08, the general assertion may be
addressed to a more or less undefined audience. This is the
case with many statements regarding common experience and
popular usage. It is the case with most scientific work; indeed,
with most serious writing. A aristotle addressed his remarks to
mankind in general, and the information which he gathered

2 It is possible for a speaker to address a specific statement of fact on a
particular occasion to an undefined audience but this is not too common. One
thinks of such cases as statements made over the radio and statements and
predictions made in historical writing.
and formulated is still being read and used by men of today. Lord Coke wrote about the English law as it stood more than three centuries ago, and his general assertions are still quoted and cited in judicial opinions of the present.

No less important than statements of present fact, narrative statements, predictions and general assertions, are interrogations, a fifth type of verbal act. Interrogations are the means through which a speaker seeks information. The first four types of informative act are used to give information to others; questions are used to obtain it for oneself. Questions are used when the speaker's information is doubtful, incomplete, or entirely lacking on some subject. It matters not whether the doubt or lack arises from the questioner's simple want of knowledge, as where he asks, "What time is it?" or whether the doubt or lack attaches to some prior statement which another party has made, where the father who tells Willie to get his pipe is met by the response, "Which pipe?" or "Where is it?" or "What did you say?" All these questions express the need for further information. A similar need may impel the lawyer to ask his client about the way in which the latter conducts his business or about the way in which business is usually conducted in the field where the client is engaged. This information may be obtained from the client, in other words, rather as a result of the lawyer's questions than as a consequence of voluntary informative statements by the client himself. In the trial of a case, the evidence which is presented to the jury is almost all obtained by means of interrogation of witnesses. Moreover, the judge may ask questions of lawyers and parties from the moment when he asks counsel whether they are ready to start the trial up to the very conclusion of the case. So that you must see that both in ordinary life and in legal work the use of interrogations to elicit information is hardly less common or important than the use of declarations to impart it. The two forms of use are complementary to one another. Strangely enough,
however, students of logic and language have devoted almost all their attention to the role of declarations and have given very little notice to the role of questions.

Sec. 1-12. Problems. Consider the following items in relation to the foregoing discussion of directive and informative uses of language.*

1. Cook:

“The object of any science is to obtain general statements which will accurately describe those aspects of past events which have been noted and also serve as aids in forecasting future events. In the field of the so-called natural sciences, such general statements are called ‘laws of nature’ or ‘natural laws’—the law of gravitation, the law of falling bodies, etc.

“The phenomena which furnish the subject matter of legal science consist primarily of the conduct of certain societal agents—judges and similar officials. The records of the past conduct of these societal agents are found in the law reports. On the basis of these records and his knowledge of the behavior-patterns of the existing societal agents—members of the present Supreme Court of the United States, of the New York Court of Appeals, etc.—and using a logical technique fundamentally similar to that of other scientists, the student of law endeavors to formulate general statements which will summarize as accurately as possible these past phenomena and also serve as an aid in forecasting future phenomena—i. e., future decisions of whatever group of societal agents he is at the time interested in. . . .”¹

What uses of language are made by the legal scientist, according to Cook?

* (I.R.) There has been much recent discussion of the general distinctions here suggested, notably in the writings of Holmes, Pound, Cook, Frank, Dickinson, Llewellyn, and Fuller. Obviously I cannot expect the beginner to go far into this subject; I only want him to make a start in noting differences between statements made in the operation of the legal system and statements made about the operation of the legal system.

2. Dickinson, after referring to scientific laws, says:

"Human laws, on the other hand, are designed precisely for the purpose of producing relations in the real world which would not otherwise exist. Their object is not to describe the operation of forces, but to set them in motion. They are 'addressed to voluntary agents who may obey or disobey them.' In so far as human laws are applied and obeyed, they thus introduce, and are intended to introduce, a new factor, an active causative element, into an existing situation; for a different chain of physical consequences will follow on the judicial act applying them from that which would result if they were not applied or were altered.

"Thus jural laws are not, like scientific 'laws,' descriptive statements of verifiable relations between persons or things—relations which exist and will continue to exist irrespective of whether human choice and agency enter into the situation. Rather they are prescriptions of specific consequences to be attached by judicial—i.e., human—action to particular relations, which would not follow from those relations without the interposition of human volition; and more remotely, through the supposedly deterrent or persuasive effect of these consequences, they operate, and are intended to operate, to actively promote certain kinds of physical relations in which it is supposed that human beings should stand, as contrasted with others in which it is equally possible as a matter of physical fact for them to stand." 2

How would you relate the distinction which he makes—between scientific and human laws—to our discussion of directive and informative verbal acts?

Can you reconcile what Dickinson says here with what Cook says about legal science? What use of language does legal science make?

3. Suppose that a person sticks his finger on a hot stove and observes the painful effect which follows. Can he derive a directive statement from this experience? An informative statement? What does this suggest?

4. In drafting a statute the lawmaker acts upon known principles of behavior. For instance, he may act upon the observations of economists regarding the buying behavior of persons who "play the stock markets." What does this suggest as regards the relation and the distinction between scientific laws and human laws?

5. Which use of language predominates in this book, judging by what you have seen of it so far? The informative or the directive?

6. "Judges follow precedent"—informative or directive?

7. "Judges ought to follow precedent"—informative or directive?

8. Suppose a lawyer advises his client of the danger of criminal liability in a particular line of conduct. Would you classify this advice as directive or informative?

9. How would you classify a client's request for advice? Does the answer to this question suggest any difficulty about our classification of interrogations?

Sec. 1-13. The mixed message. Unfortunately for simplicity's sake, the various types of verbal act which we have discussed are not always found in pure form. Indeed, it is probably safe to say that actual verbal acts are more often complex than simple. They are compounded from different directive and informative elements.

Both directive and informative elements may be combined in the same verbal act, even in the single sentence or smallest verbal act; and more often in larger complex acts such as a statute or legal treatise. For example, the father may say to Willie, "Fetch my pipe; it's in the library," or "Fetch my pipe from the library." Either way his statement is a compound of direction and information. Such compounds are very common in legislation. A typical statute begins with a recital of mischiefs, such as the prevalence of certain harmful activ-
ities (informative element), and concludes with the prohibition of them (directive element).

Also, different directives may be coupled together in one verbal act. These directives may be of different types. A specific and a general directive may be joined in one provision. This was done in the Parliamentary mandate to boil the Bishop of Rochester's cook (sec. 1-10); the penalty was prescribed for the cook specifically and for any other person who might subsequently commit the same offense as he had. And even more important, directives may be addressed to different persons in one statute, just as if a hunter were to try to bring down two ducks with one charge of shot. A typical instance of this sort is the statute which issues a command to A, B, and C and also gives directions to officials as to what they are to do if A, B or C fails to do what is commanded. In fact, this is probably the most common form which legislation takes.

In parallel fashion various informative elements are often linked with one another in verbal acts. A speaker gives one general assertion as the reason for another. The average man is hostile to railroads; therefore, the average jury finds for the plaintiff in suits against railroads for personal injuries. Or a speaker may make a compound declaration in which he includes a general assertion and a specific prediction based upon it; he may declare that juries usually find for the plaintiff in the manner just stated (general assertion), and that he expects the jury to do just this in a particular pending case.

Other combinations of elements are possible; these are enough to make the general point. Any verbal act must be analyzed. It cannot be safely assumed that it is wholly directive or informative. The mixed message is very common in actual practice.

Sec. 1-14. Verbal acts in discourse. The verbal act may not only be itself a complex affair as was pointed out in the
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last section, but any verbal act may form a part of a larger body of discourse. Usually, in fact, the statement of one speaker does not stand isolated and alone. It is coupled with the verbal acts of other persons in larger bodies of discourse and cannot be understood or interpreted apart from the discourse of which it is a part. The question by S is followed by an answer by H. The father’s command to get his pipe is followed by Willie’s question, “Where is it?”; this in turn by the father’s reply that it is in the library. Verbal acts, as one might say, are woven together in a continuous process of communication. This process comprises a series of verbal acts all of which are connected together in execution. Consider, for instance, the following trivial conversation between students, a typical example of the connectedness in the process of communication:

S: “Where are you going?”
H: “I am going to class.”
S: “What class?”
H: “Professor Jones’ lecture in Zoology.”
S: “What sort of fellow is he?”
H: “He is a funny old bird. His lecture is always pretty dull.”

Here you can readily see how the separate statements which make up this conversation are woven together in one piece. Each new statement is tied into what had gone before. No statement stands alone. For instance, the meaning of the word lecturer in the last sentence of this series depends upon the verbal expressions which have gone before. The same observation applies to other elements in the series of statements, such as the word “he,” “class,” etc. Two parties participate alternately as speaker and hearer; the joint product of their verbal activity is regarded as a unity or whole. This composite whole also bears a type name—a conversation.

Substantially similar observations might be made regarding a lawsuit. This also is a continuous process of communica-
tion, a unified body of discourse. But, at the same time, it includes a number of subordinate steps or distinguishable verbal acts: the summons, the declaration, the answer, the demurrer and other pleadings, the testimony of witnesses, as well as written evidence, the instructions, the arguments of counsel, the verdict, the judgment and other orders, the various steps on appeal, the appellate court’s opinion, etc. While each of these verbal acts may be regarded as separate for some purposes, we do also commonly regard them as parts of a whole. They have a coherence with one another, i.e., in relation to a single controversy between X and Y, which makes us treat them as a single entity, a complex legal conversation, which we know as a lawsuit.

We shall have frequent occasion to refer later to bodies of legal discourse. Most important legal processes can be regarded as extensive legal conversations. The process of law-making, the process of interpretation, the process of adjudication, and the process of expounding law in textbook form can be so regarded and will be treated and analyzed in these terms. But I have said enough for the present; I merely wanted to point out to you here how verbal acts are tied together in discourse and, correspondingly, how larger bodies of discourse are built up as aggregates of individual statements.

**Sec. 1–15. The indirect message.** Doubtless the original form of communication is the direct message delivered face-to-face. This form is still much used and very important but is seriously restricted in range. The range of communication is widened if messages can pass indirectly from speaker to hearer through intermediaries.¹ Mediation may be accomplished at the instance of the speaker when he delivers to

¹ The telephone, telegraph, and radio have widened the scope of person-to-person communication, though such communication is hardly face-to-face and usually involves the aid of intermediaries.
R a message which R in turn is to transmit to H; or where R on his own initiative reports to H the words said by S; or where H sends R to S for a message. These cases differ as regards the person who takes the initiative in transmitting the message; they are alike in that an intermediary figures in the process. The fact that R can mediate between S and H enhances the possibilities of communication both in space and time. Spatially, it enables S’s message to reach H even when these parties are too far apart for direct communication to occur. Temporally, a similar widening of range is made possible. The learning and traditions of one age are passed on to succeeding ages, by word of mouth, through numberless intermediaries.

With the invention of writing, and later of printing, another form of indirect communication is established; and communicative range is further expanded both in space and time. Moreover, the durable quality of writing and printing makes possible a degree of certainty and definiteness which oral communication seldom has. For example, Aristotle’s words are still available to us, though more than two millennia have passed since he lived, and available just as he wrote them. In written and printed form human knowledge is accumulated and stored for the benefit of those who want to use it. These means of indirect communication have played a tremendous role in building, transmitting, and storing our social heritage of knowledge. Legal traditions and ideas are a part of this heritage and have come down to us for the most part in written or printed form.

\(^2\) And very recently sound recording has been added to the means of perpetuating what is said.

\(^3\) The writings themselves are ordinarily transmitted by third parties so that written communication also involves the intervention of intermediaries.

\(^4\) For the present purpose it seemed necessary to distinguish printing and writing, as printing is a relatively modern invention. Writing and printing have also had quite different significance socially and historically. However for ordinary purposes writing is used to include printing and I shall follow this common usage from this point on.
However, this widening of communicative range is fraught with certain perils. The dangers of communicative failure, which are present even when S communicates with H face-to-face, are greatly multiplied. When a manuscript is handed down as Aristotle's work, there is always the chance that it is not what it purports to be. When a letter is sent by messenger or by mail, it may be lost in transit; a face-to-face message could not miscarry in this way. When S's message is reported by R to H, especially when the message and the report are both oral, the dangers that R will misunderstand the message and that he will misstate its true tenor are added to the normal dangers of misunderstanding in direct communication. And when statement is piled upon statement, as where A says that B says that C says such and such a thing; or direction is piled upon direction, as where father tells Willie to tell mother to tell Johnnie to mow the lawn, we can easily lose ourselves in the very maze of our own discourses, to paraphrase a remark by Hooker. Legal transactions and legal discussion have not always escaped these pitfalls as we shall see in later chapters.

Sec. 1–16. Problems. Consider the following items in relation to the discussion of the five preceding sections.

1. Suppose A is called for jury service and says to the judge, "My wife is ill and I would like to be excused." Analyze the mixture of statements involved here.

2. A witness, on a trial of D for robbery of P, says, "Then I heard D say to P, 'Stick up your hands.'" Analyze.

3. "In general, the law admits the testimony of a witness only as to what he has himself observed; it does not permit him to testify in reference to what others have told him or to what he has heard them say. This is the so-called 'hearsay' rule. Behind this rule are two basic reasons: first is a sound distrust of rumor and second-hand report. Second is a specific purpose to subject all testimony to the check of cross-exam-

5 Hooker, Ecclesiastical Polity, V, chaps. 2, 4 (1662).
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...the story of many a witness sounds different after it has been tried by this acid test. All students of methods of proof agree that there is a solid foundation for the hearsay rule, as a general proposition.”

What do you find in section 1–15 to justify this legal rule?

4. The paragraph above quoted continues, “Nevertheless the rule has had to give way in practice to a long list of exceptions.” Of these I shall mention only two:

“Pedigree exception: No person knows of the time of his own birth or his parentage and relationships, except by second-hand report. Likewise of the birth, parentage, and relationships of others. Statements made to a witness by deceased members of the family are admissible to establish said facts.

“Scientific matters: Every physician or other learned person, obtains his knowledge largely from books; so far as he testifies on the basis of this learning he is giving a second-hand report of the experience of others, nevertheless he is permitted to testify on this basis.”

How would you explain or excuse these exceptions?

5. Suppose S makes a New Year’s resolution, e. g., “I’ll never touch another drop.” Can this be viewed as a directive use of language? If so, who issues the direction? To whom is it addressed? Whose behavior is to be controlled by it? Can the resolution be viewed as an informative use of language? If so, to whom is the informative verbal act addressed?

Sec. 1–17. Summary. Communication lies at the heart of the legal processes. Verbal acts are done to direct others and to convey or obtain information. The legislature communicates its directives to the populace in verbal form. Most of the acts which officials do are verbal acts. And the lawyer spends most of his time in doing or guiding or interpreting verbal acts. You must see therefore why I think it is important for the legal neophyte to become “language conscious.”

1 The passages quoted in this problem are taken from the syllabus of my lectures in Medical Jurisprudence 26–27.
You must understand also why I regard training in the use and analysis of language as most fundamental both in the preparation for legal study and in legal study itself. The lawyer must know his verbal tools: he must be a verbal artisan of no mean skill.