Edited for reading by RSN

Bozo Leges

> **"If the law supposes that," said Mr. Bumble, squeezing his hat emphatically in both hands, "the law is a ass--a idiot."** ***Oliver Twist, Chapter 51.***

Mr. Bumble's outraged protest against the asininity of the law as applied to himself provides a worthy introduction to a short piece on legal foolishness, both individual and institutional. We begin our search for the legal version of *bozo sapiens* — a subspecies which we might label *bozo leges* – among lawyers and their real or putative clients.

Lawyers do, of course, come in for a lot of criticism – and that from persons more literate than the henpecked beadle who some hundreds of pages earlier had denied little Oliver Twist an extra serving of gruel. An old favorite from Ambrose Bierce defines "lawyer" as "One skilled in circumvention of the law." H. L. Mencken goes a bit further when he defines "lawyer" as "One who protects us from robbers by taking away the temptation." The Sage of Baltimore also gave the snoot to judges: a "judge," he wrote, is "a law student who marks his own papers."

There are plenty of examples of legal bozos who have become entangled in the law's embrace. Try this one from the *Cincinnati Enquirer* of October 8, 2010:

> Selma Elmore, 44, was arrested in Lockland, Ohio, when she flagged down a police car to ask if there was an arrest warrant out for her. There was. She ran – and was charged both with the warrant offense and with resisting arrest, which is a more serious charge than the one in the warrant.

A more recent article in the *Enquirer*, dated March 16, 2011, tells us of the quick arrest of a bank robber in Dallas who handed over two forms of ID when the teller told him she could not give him money without an ID. Eight years for this bozo!

Once in court, the hapless defendants must hope that he has not inadvertently retained bozoid counsel. A few howlers by supposedly competent attorneys demonstrate the hazards of cross-examination, even for professionals who get paid for this sort of thing. A typical example is the surprise answer to a carelessly worded question:

Lawyer: "Have you lived in this town all your life?"

Witness: "Not yet."

The risks multiply with experienced witnesses, such as experts or police officers:

Lawyer: "Trooper, when you stopped the defendant, were your red and blue lights flashing?"

Witness: "Yes."

Lawyer: "Did the defendant say anything when she got out of her car?"

Witness: "Yes, sir."

Lawyer: "What did she say?"

Witness: "What disco am I at?'"

So much for *that* DUI defense!

One more example:

Lawyer: "Doctor, before you performed the autopsy, did you check for a pulse?"
Witness: "No."
Lawyer: "Did you check for blood pressure?"
Witness: "No."
Lawyer: "Did you check for breathing?"
Witness: "No."
Lawyer: "So, then it is possible that the patient was alive when you began the autopsy?"
Witness: "No."
Lawyer: "How can you be so sure, Doctor?"
Witness: "Because his brain was sitting on my desk in a jar."
Lawyer: "But could the patient have still been alive nevertheless?"
Witness: "Yes, it is possible that he could have been alive and practicing law somewhere."

Retaining competent counsel—and there are some, I assure you—may not solve all your problems. Litigation is expensive, even when—or rather especially when—both sides are well represented. This problem has a long history, as exemplified by Voltaire's remark that he had been ruined only twice in his life, "once when I lost a lawsuit and once when I won one." Things were no better a century later, when Ambrose Bierce defined "lawsuit" as "A machine which you go into as a pig and come out of as a sausage."

The blame for all this judicial mayhem must, of course, fall upon the lawyers, whose trade, accordingly to Thomas Jefferson, is "to question everything, yield nothing, and to talk by the hour." To them, the law's delay whispers not disaster, but good fortune. Thus, Dickens tells us in *Bleak House* that "The one great principle of the English law is to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings." Sadly, even the great Clarence Darrow, who saved Leopold and Loeb

from the electric chair, could offer no defense for his professional colleagues. "The trouble with law," he said, "is lawyers." Whether he included himself in this sweeping admission is doubtful, but the point still stands.

Even though reforming lawyers may be hopeless, surely we can hope to mitigate matters at least a little by reforming the law. Taking the *very* long view, it is possible to say that we have made some progress since the days when outcomes were determined by witch-dunking, trial by combat and ordeal by fire—although some would argue that the ordeal is now financial rather than physical. Still, the modern trial is an improvement over the former practice of determining guilt by dunking a suspected witch in water to see if she would float – particularly when the principle being observed was that a witch would float whereas an innocent person would drown. Given a choice, I would opt for trial by combat, which provided better odds by acquitting the winner and – even better – by permitting the use of a substitute champion. One might think of the substitute champion as the medieval version of today's lawyer, although none of the modern kind is likely to claim that it was God who gave the victory.

The institutional view brings us back to Mr. Bumble, whose ire at the law's asininity erupted when he was told that he, the husband, was responsible for Mrs. Bumble's concealment of the talisman that would have proved Oliver's true identity. His temper would not have been improved by learning that his lateral defenestration from the beadleship was based on an erroneous statement of the law. Although a husband at the time and place of the novel would have been responsible for damages caused by his wife's *negligence*, this was not true of a wife's criminal conduct. More to the point, the rule in question was *not* asinine in a society where the husband had complete control of a wife's assets, since he was the only person in a position to give compensation for damages caused by his wife's tortious negligence.

What was true of Mr. Bumble is often true of those who criticize legal rules: they either misstate the rule or fail to understand its underlying rationale. I can illustrate my point by taking a brief look at another much-criticized legal rule to determine whether it is really as crazy as it sounds. My example is doubtless familiar to the lawyers here present, even though most probably have not encountered it since leaving law school. I refer, of course, to the dreaded Rule Against Perpetuities, the bane of law students and occasional snare for legal draftsmen.

The Rule Against Perpetuities began in the late 17th Century as a hostile judicial reaction to an attempt by the Duke of Norfolk to set up a trust that would control the devolution of his vast estates for multiple generations. As developed over time, the Rule operates to limit the duration of contingencies that might cause ownership to shift from one owner to another on the happening of some uncertain future event. To accomplish this, the Rule provides that any "future interest"– that is, any interest in property that can only come into existence on the happening of a future event of uncertain timing–is void unless it is logically certain that the future event will occur within a period of time that is measured by the life of some identifiable living person plus an additional 21 years.

To illustrate, if Jones transfers property to Smith for life, and then to Smith's children, there is no problem with the future transfer to Smith's children, whenever it may occur. This is because Smith is the measuring life and all of Smith's children, whether born before or after the creation of the interest, will necessarily be born (or at least conceived, which is good enough for the Rule) within Smith's lifetime.

But if Jones goes further and provides that the property will go to Smith's grandchildren when the last of Smith's children dies, the gift to Smith's grandchildren will fail. This is because Smith *could* have additional children after the time of transfer, who in turn *might* have children that are born more than 21 years after Smith dies. Since the

identities of *all* of Smith's grandchildren cannot be determined until the last of Smith's children dies, the potential existence of these hypothetical grandchildren defeats the interests of the whole class.

This defect could be fixed by limiting the class of grandchildren to those who are born within 21 years of Smith's death. Unfortunately, draftsmen don't always see the problem and thus don't take the relatively simple steps needed to fix it. We might call some of these draftsmen bozos, but that would be unkind. It should be sufficient if the disappointed grandchildren sue them for malpractice, which they sometimes do.

The Rule in its original form has been much criticized because of a requirement that it must be applied solely by reference to the words used in the instrument of transfer, *without regard to the actual facts of the particular transaction.* This can cause some odd results, but does that make the Rule asinine?

A favorite of the critics is "**the case of the fertile octogenarian**." In my second example, where the problem is caused by a gift over to Smith's grandchildren, one of whom *might* be the child of an after-born child of Smith who is born more than 21 years after Smith's death, it will make no difference if we are told that Smith is a female of advanced age who is medically incapable of having children. Too bad. It is logically possible, if highly unlikely, that Smith could have more children, and that is all that counts. Besides, Smith might *adopt* a child who was not born at the time of transfer who *might* have children born more than 21 years after Smith's death, so there!

There are other anomalies, such as **"the case of the miraculous gravel pit**," which invalidates a future interest in property that is to begin when a nearly exhausted gravel pit is closed because it is *possible*, if unlikely, that the pit will stay open for more than 21 years after the

intended transferee dies. However, we need not proceed to examine them, as I am sure that you have gotten my drift long before now: the Rule can be a trap for the unwary draftsman, to the detriment of the unwary clients who hired him or her to do the drafting.

Since we have already given up on better draftsmanship by lawyers as a solution to the problem, it appears that the only practical way to protect clients from their less-than-able counselors is to change the law. To that end, England and 28 states have adopted "wait and see" statutes that validate future interests if the conditions of their creation actually do occur within 90 years of the effective date of the creating instrument. This is nice, I suppose, but the cure could be worse than the disease, as it reduces the sale and loan value of the present interests for nearly a century while we wait to see if something that may never happen actually does happen.

At the other extreme, Ireland and a few American states have abolished the Rule in its entirety, which opens the door to the creation of trusts for multiple generations of family members that have the potential of lasting forever--or until the money or blood line runs out, whichever first occurs. These so-called "dynasty trusts" can help to avoid a lot of estate taxes, which perhaps is a good thing. However, if you belong to the Warren Buffet school of child rearing, you might think it unwise to permit the wealthy to endow their remote descendants with assets that might better serve society by being returned to the stream of commerce. This is what the stolid judges of Merry Old England thought, and we have to wonder why they were wrong.

I hope I have said enough to show that it may require some expertise to understand whether a particular law is asinine. One might even want to consult—are you ready?—a lawyer before reaching a final conclusion. And if you plan on making gifts to grandchildren and beyond, you had better get a good one.

The simple truth is that, love them or loath them, we do need persons who are skilled in the law to assist society in its day-to-day functioning. And it is undeniable that persons with those skills do exist. For every bumbling cross examiner there is the counter example of a brilliant advocate who saved his client through a meticulous series of questions that brought out the truth. Who can forget how the young Abraham Lincoln carefully maneuvered a perjured witness into insisting that he saw the accused fire a fatal shot by the light of the moon, only to be confounded when Lincoln produced an almanac showing the moon was dark on the date of the murder? And for every venal or corrupt lawyer, there is an example of great courage in upholding the obligations of the profession. My personal hero is Raymond DeSeze, who dared to defend Louis XVI in his trial before the General Assembly--and did his job so skillfully that 288 of the Deputies voted against the death penalty. That his failure to save the King was a foregone conclusion only adds to the luster of his efforts.

In conclusion, we can certainly say there is no doubt that the species *bozo leges* is alive, well and sadly numerous. Even so, I would dispute the classic witticism, which regrets that 98% of lawyers have given the rest a bad name. To the contrary, I think the percentage should be reversed.

James Wesner
April 19, 2011