

## EDITORIAL

PERHAPS the chief victims of Prohibition, in the long run, will turn out to be the Federal judges. I do not argue here, of course, that drinking bootleg liquors will kill them bodily; I merely suggest that enforcing the unjust and insane provisions of the Volstead Act will rob them of all their old dignity. A dozen years ago, or even half a dozen years ago, a Federal judge was perhaps the most dignified and respected official yet flourishing under our democracy. The plain people, many years before, had lost all respect for lawmakers, whether Federal, State or municipal, and, save for the President himself, they had very little respect left for the gentlemen of the executive arm, high or low. More, they had begun to view the State judiciary very biliously, and showed no sign of surprise when a member of it was taken in judicial adultery. But for the Federal judges they still continued to have a high veneration, and for plain reasons. *Imprimis*, the Federal judges sat for life, and thus did not have to climb down from their benches at intervals and clamor obscenely for votes. Secondly, the laws that they were told off to enforce, and especially the criminal laws, were few in number, simple in character, and thoroughly in accord with almost universal ideas of right and wrong. No citizen in his right mind had much sympathy for the felons who were shipped to Atlanta each morning by the marshals of the Federal courts—chiefly counterfeiters, fraudulent bankrupts, adulterators of food and drugs, get-rich-quick swindlers, thieving letter-carriers, crooked army officers, and so on. Public sentiment was almost unanimously behind the punishment of such rogues, and it rejoiced that that punishment was in the hands of men who carried on the busi-

ness in an austere manner, without fear or favor.

I describe a Golden Age, now lamentably closed. The Uplift in its various lovely forms has completely changed the character of the work done by a Federal judge. Once the dispenser of varieties of law that only scoundrels questioned, he is now the harassed and ludicrous dispenser of varieties of law that only idiots approve. It was the Espionage Act, I suppose, that first brought him to this new and dreadful office, but it is Prohibition—whether of wine-bibbing, of drug-taking, of interstate week-ending, or of what not—that has carried him beyond the bounds of what, to most normal men, is common decency. His typical job today, as a majority of the plain people see it, especially in the big cities, is simply to punish men who have refused or been unable to pay the bribes demanded by Prohibition enforcement officers. In other words, he is now chiefly apprehended by the public, not as a scourge of rascals, but as an agent of rascals and a scourge of peaceable men. He gets a great deal more publicity than he used to get in his palmy days, but it is publicity of a sort that rapidly undermines his dignity. Unfortunately for him, but perhaps very fortunately for what remains of civilized government among us, the plain people have never been able to grasp the difference between law and justice. To them the two things are one—or ought to be. So the fact that the judge is bound by law to enforce all the intolerable provisions of the Volstead Act, including even its implicit provision that men wearing its badges shall get a fair percentage upon every transaction in bootlegging—this fact does not relieve the judge himself of responsibility for the ensuing oppressions. The only thing that

the vulgar observe is that justice has departed from his court room.

If this were all, of course, it might be possible to dismiss the whole matter on the ground that the public is an ass. That men of the highest worth are not always respected, even when they wear official robes, is a commonplace. But in the present case there is more to it than merely that. Not a few of the Federal judges have begun to show signs that the noisome work that has been forced upon them has begun to achieve its inevitable subjective effects; in other words, not a few begin to attack their sneaking sense of its lack of dignity and good repute by bedizening it with moral indignation. The judicial servant of the Anti-Saloon League thus takes on some of the neo-Christian character of the League's own dervishes and sorcerers. He is not content to send some poor yokel to jail for an artificial crime that, in the view of at least 80 per cent of all Americans, is no crime at all; he must also denounce the culprit from the bench in terms fit for a man accused of arson or mayhem. Here the Freudians, perhaps, would have something to say; the great masses of the innocent and sinful, knowing nothing of Freud, observe only that the learned jurist is silly as well as unjust. There issues from that observation a generally bilious view of his office and his person. He slides slowly down a fatal chute. His day of arctic and envied eminence passes.

## II

The truth is, indeed, that the decline in dignity from which the Federal judges now suffer is not wholly due to the external fact of Prohibition; it is due quite as much to their own growing pliancy and lack of professional self-respect. All that Prohibition does to them is to make brilliantly plain, even to the meanest understanding, their lamentable departure from that high integrity of purpose, that assiduous concern for justice, that jealous watchfulness over the rights of man which simple men, at all times and everywhere, like to find in the

judges set over them, and which the simple men of the United States, not so long ago, saw or thought they saw in the learned ornaments of the Federal bench. Before ever Volstead emerged from the Christian Endeavor belt with his preposterous Act, confidence had begun to shake. The country had seen Federal judges who were unmistakably mountebanks; it had seen some who were, to the naked eye, indistinguishable from rascals. It had seen one step down from the highest court in the land to engage in an undignified stumping-tour, soliciting the votes of the rabble. It had seen another diligently insinuate himself into the headlines of the yellow press, in competition with Jack Dempsey and Babe Ruth. It had seen others abuse their powers of equity in the frank interest of capital, and deny the commonest justice to poor men in their clutches. And during the war it had grown accustomed to seeing the Federal bench converted into a sort of rival to the rostrum of Liberty Loan orators, with judges hurling pious objurgations at citizens accused of nothing worse than speaking their minds freely, and all pretense to fair hearings and just punishments abandoned.

True enough, a majority of the Federal judges, high and low, stood quite clear of all such buffooneries. Even in the midst of the worst hysteria of the war there were plenty who refused to be run amok by Palmer, Burleson and company. I need cite only Hand, J., and Rose, J., as admirable examples of a large number of judges who preserved their dignity 'mid the rockets' red glare. But the headlines in the newspapers had nothing to say about such judges; their blackest ink was reserved for the other kind, as it was more recently reserved for Mayer, J. That other kind gradually established a view of the Federal bench that still persists, and that is growing more and more fixed as the farce of Prohibition enforcement unrolls. It is a view which, in brief, holds that the Federal bench is no longer the most exalted and faithful protector of the liberties of the cit-

izen, but the most relentless and inordinate foe of them—that its main purpose is not to dispense justice at all, but to get men into jail, guilty or not guilty, by fair means or foul—that to this end it is willing to lend itself to the execution of any law, however extravagant, and to support that execution with a variety of casuistry that is flatly against every ordinary conception of common sense and common decency. The Espionage Act cases, the labor injunction cases, the deportation cases, the Postal Act cases, the Mann Act cases, and now the Prohibition cases—all of these, impinging in rapid succession upon a people brought up to regard the Bill of Rights as a reality and liberty as a precious thing, have bred suspicion of the Federal courts, including especially the Supreme Court, and, on the heels of that suspicion, a positive and apparently ineradicable distrust. I doubt that the Radical fanatics who dodge about the land have ever converted any substantial body of Americans to their crazy doctrines; certainly there is not the slightest sign today of the Revolution that they were predicting for last year, and the year before. But when they have denounced the Federal courts and produced the overwhelming evidence, their shots have gone home.

### III

Now and then a judge has argued, defending himself against some manifestation of popular discontent, that he is helpless—that he is the agent, not of justice, but of law. Even in the hey-day of the Espionage Act a few were moved to make that apology from the bench, including, if I remember rightly, the judge who sentenced Debs. The distinction thus set up is one that seems clear to lawyers, but, as I have said, it seldom gets a hospitable hearing from plain men. If the latter believe anything at all it is that law without justice is an evil thing; that such law, indeed, leads inevitably to a contradiction in terms; that the highest duty of the judiciary is not to enforce it pedantically, but to evade it, viti-

ate it, and, if possible, destroy it. The plain man sees plenty of other sorts of law destroyed by the courts; he can't help wondering why the process is so seldom applied to statutes that violate, not merely legal apothegms, but the baldest of common sense. Thus when he beholds a Federal judge fining a man, under a constitutional amendment prohibiting the sale of intoxicating beverages, for selling a beverage that is admittedly not intoxicating, or jailing another man who has got into the dock, as everyone knows, not because he ran a still but because he refused to pay the bribe demanded by the Prohibition enforcement officer, or issuing against a third an injunction whose sole and undisguised purpose is to deprive him, by a legal swindle, of his constitutional right to a trial by a jury of his peers—when he observes such monkey-shines going on in the name of the law, is it any wonder that he concludes dismally that the law is an ass, and its agent another? In ordinary life men cannot engage in such lunatic oppressions of their fellow men without paying a penalty for it; even a police captain must be measurably more plausible and discreet. If a judge is bound by his oath to engage in them, then so much the worse for the judge. He can no more hope to be respected than a hangman can hope to be respected.

But is a judge actually so bound? I am no lawyer, but I nevertheless presume to doubt it. There were judges in 1918 who did not think themselves bound to sacrifice the Bill of Rights to the Espionage Act, and who resolutely refused to do so, and yet, so far as I know, nothing happened to them; at least one of them, to my knowledge, has been since promoted to a circuit. Why should any judge today enforce the injunction clause of the Volstead Act, which is not only not authorized by anything in the Eighteenth Amendment, but is flatly and unquestionably subversive of the Fourth, Fifth and Sixth Amendments? Its enforcement is surely not an automatic act; it involves deliberation and decision by the judge; he may refuse his injunction with-

out offering any explanation to anyone. What would follow if he arose one day in his high pulpit, and announced simply that his court was purged of all such oblique and dishonest enactments henceforth—that he had resolved to refuse to lend himself to the schemes of blackmailers with badges, or to harass and punish free citizens in violation of their fundamental constitutional rights and their plain dignity as human beings, or, in brief, to engage in any other enterprise as a judge that he would shrink from engaging in as a good citizen and a man of honor? Would the result be impeachment? I should like to meet a Congressman insane enough to move the impeachment of such a judge! Would it be a storm of public indignation? . . . Or would it be a vociferous yell of delight?

It seems to me, indeed, that the first judge who rises to such a rebellion will be the first judge ever to become a popular hero in the Republic—that he will be elevated to the Supreme Court by a sort of acclamation, even if it is necessary to get rid of one of the sitting justices by setting fire to his gown. But, it may be said, even imagining him so elevated, the remaining eight justices will still function, and all of us know what they think of the Bill of Rights. Wouldn't such a rebel judge succumb to the system of which it was a discreet particle? Couldn't the other eight judges nullify and make a mock of his late heroic defiance? Could they, indeed? Then how? If a judge, high or low, actually called in justice to rescue a citizen from the law, what precisely could the Supreme Court do about it? I know of no appeal for the District Attorney in Federal cases, once the prisoner has been put into jeopardy; I know only of impeachment for judges who forget the lines of the farce to which they are sworn. But try to imagine the impeachment of a judge charged with punching a hole in the Volstead Act, and letting in some common justice and common decency!

So far, no such rambunctious and unprec-

edented judge has been heard of, nor do I specifically predict his advent. He may come, but probably he won't. The law is a curse to all of us, but it is a curse of special virulence to lawyers. It becomes for them a sort of discreditable vice, a stealthy and degrading superstition. It robs them of all balance, of all capacity for clear thought, of all imagination. Judges tend to show this decay of the faculties in an exaggerated form; they become mere automata, bound by arbitrary rules, precedents, the accumulated imbecilities of generations; to their primary lack of sense as lawyers they add the awful manner of bureaucrats. It is thus too much to hope for a judge showing any originality or courage; one Holmes in an era of Hardings and Coolidges is probably more than a fair allotment. But while the judges of the District Courts go on driving wild teams of jackasses through the Bill of Rights, and the rev. seniors of the Supreme Court give their approval to the business in solemn form,—sometimes, but not always, with Holmes, J., and Brandeis, J., dissenting—while all this is going on, there are black clouds rolling up from the hinterland, where the Constitution is still taught in the schools and even Methodists are bred to reverence Patrick Henry. The files of Congress already show the way the wind is blowing—constitutional amendments to drag down and denaturize the Supreme Court, simple acts to the same end, other acts providing for the election of Federal judges, yet others even more revolutionary. I know of no such proposal that has any apparent merit. Even the best of them, hamstringing the courts, would only augment the power of a Congress that is ten times worse. But so long as judges pursue fatuously the evil business of converting every citizen into a subject, demagogues will come forward with their dubious remedies, and, soon or late, unless the bench pulls up, some of these demagogues will get themselves heard.

H. L. M.

# CAUGHT

BY SHERWOOD ANDERSON

IT SEEMS but yesterday, although a year has passed since that afternoon when Edward and I sat talking in a restaurant. I was staying at a small hotel in a side street in the city of New York. It had been an uncertain day with us, such days as come in any relationship. One asks something of a friend and finds him empty-handed or something is asked and a vacant look comes into one's own eyes. Two men, or a man and woman, were but yesterday very close and now they are far apart.

Edward came to lunch with me and we went to a restaurant in the neighborhood. It was of the cheap, hurried, highly-sanitary sort, shiny and white. After eating we sat on and on, looking at each other, trying to say to each other something for which we could find no words. In a day or two I would be going away to the South. Each of us felt the need of something from the other, an expression of regard perhaps. We were both engaged in the practice of the same craft—story-tellers both of us. And what fumblers! Each man fumbling often and often in materials not well enough understood—that is to say, in the lives and the drama in the lives of the people about whom the tales were told.

We sat looking at each other and, as it was now nearly three o'clock in the afternoon, we were the only people in the restaurant. Then a third man came in and sat as far away from us as possible. For some time the women waiters in the place had been looking at Edward and myself somewhat belligerently. It may have been they were employed only for the noon rush and now wanted to go home. A somewhat

large woman, with her arms crossed, stood glaring at us.

As for the third man in the place, the fellow who had just come in, he had been in prison for some crime he had committed, and had but recently been let out. I do not mean to suggest that he came to Edward and myself and told his story. Indeed, he was afraid of us, and when he saw us loitering there, went to sit as far away as possible. He watched us furtively with frightened eyes. Then he ordered some food and, after eating hurriedly, went away, leaving the flavor of himself behind. He had been trying to get a job but on all sides had been defeated by his own timidity. Now, like ourselves, he wanted some place to rest, to sit with a friend, to talk, and by an odd chance I, and Edward as well, knew the fellow's thoughts while he was in the room. The devil!—he was tired and discouraged and had thought he would go into the restaurant, eat slowly, gather himself together. Perhaps Edward and myself—and the waitress with her arms crossed who wanted to get our tip and cut out to some movie show—perhaps all of us had chilled the heart of the man from prison. "Well, things are so and so. One's own heart has been chilled. You are going away to the South, eh? Well, good-by; I must be getting along."

## II

I was walking in the streets of the city, that evening of November. There was snow on the roofs of buildings, but it had all been scraped off the roadways. There is a thing happens to American men. It is