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## *The Great Gatsby, The Black Sox, High Finance, and American Law*

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## ESSAY

### ***The Great Gatsby, the Black Sox, High Finance, and American Law***

*Allen Boyer\**

*The Great Gatsby*, by F. Scott Fitzgerald, is the great novel of America in the 1920s. It is about someone pursuing a girl, and, more than that, it is about someone pursuing a dream. Jay Gatsby is someone who believes in the American dream of success. His life plays out the most famous piece of repartee between Fitzgerald and Hemingway — that the rich are very different from you and me, because they have more money. Gatsby is a man who thought that if he had the money, he would be rich, and could therefore be different.

After reading *Gatsby*, one remembers the parties which its hero threw: dusk-to-dawn galas peopled by financiers, Broadway stars, and the polo-playing aristocracy. But behind the glitter there are occasional glimpses of darkness. Gatsby is a man with no background. Some say he is the Kaiser's nephew, some have heard that he once killed a man. He has unsavory connections — perhaps even criminal connections. His past is a mystery, and there is something in his present which he wants to conceal.

What Gatsby's connections are, where he made his money, Fitzgerald keeps vague.<sup>1</sup> Nick Carraway, the narrator, asks Gatsby what business he is in. Gatsby replies, brusquely, "That's my affair" — then apologetically realizes his rudeness, and says that he was in the drug business for a while, and that he was in oil for a while.

It is just barely possible, given the timing, that Gatsby was involved with Teapot Dome. And his pharmaceutical business meant bootlegging: he owned part of a chain of drug stores which sold grain alcohol over the counter. Tom Buchanan, his rival for Daisy Buchanan, reveals this bootlegging connection near the end of the

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1. See generally Randall, *Jay Gatsby's Hidden Source of Wealth*, 13 MOD. FICT. STUD. 247 (1967).

novel. But there is something else Gatsby is involved with. Even Tom Buchanan can't identify it, because his sources are too scared to talk. All we know is that, as Tom says, compared to it, the bootlegging is "just small change."

Two shadows fall directly across Gatsby's career. We know that he is involved with stolen securities. He sounds out Nick, a bond salesman, about working for him:

"[I]f you'll pardon my — you see, I carry on a little business on the side, a sort of side line, you understand. And I thought that if you don't make very much — You're selling bonds, aren't you, old sport?"

"Trying to."

"Well, this would interest you. It wouldn't take up much of your time and you might pick up a nice bit of money. It happens to be a rather confidential sort of thing."<sup>2</sup>

At the novel's end, when Nick answers a phone call in Gatsby's empty house, he finds out what this sketchy invitation meant. The man on the long-distance line from Chicago tells him: "Young Parke's in trouble. They picked him up when he handed the bonds over the counter."<sup>3</sup>

We also know that Gatsby is the business partner of Meyer Wolfsheim — and that Wolfsheim is the man who fixed the 1919 World Series. Nick remembers their introduction:

"[H]e's a gambler." Gatsby hesitated, then added coolly: "He's the man who fixed the World's Series back in 1919."

....

The idea staggered me. I remembered, of course, that the World's Series had been fixed in 1919, but if I had thought of it at all I would have thought of it as a thing that merely *happened*, the end of some inevitable chain. It never occurred to me that one man could start to play with the faith of fifty million people — with the single-mindedness of a burglar blowing a safe.<sup>4</sup>

Both of these scandals — securities fraud and the Black Sox — trace back in fiction to Meyer Wolfsheim. In life they trace back to Wolfsheim's real-life counterpart, Arnold Rothstein.

## I. CAPITAL AND THE UNDERWORLD

Arnold Rothstein was the first great financier of organized crime. Rothstein talked very little about himself. Others, however, called him "the Brain" and "the Big Bankroll." His attorney, William Fal-

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2. F.S. FITZGERALD, *THE GREAT GATSBY* 83 (Hudson River ed. 1980).

3. *Id.* at 167.

4. *Id.* at 74. For the best history of the Black Sox scandal, see E. ASINOF, *EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES* (1963).

lon — unsurpassed for courtroom eloquence, but so crooked that he makes Roy Cohn look like a saint — described Rothstein as “a man who dwells in doorways. A mouse standing in a doorway, waiting for his cheese.”<sup>5</sup>

We will not discuss Rothstein's role as the contact man between Tammany Hall and the New York City underworld. We will not discuss his role in labor union racketeering. We will not discuss his role as mentor to John T. Nolan, Arthur Flegenheimer, and Charles Lucania — who would later be known, respectively, as Legs Diamond, Dutch Schultz, and Lucky Luciano. We will not discuss his interests (financial, not personal) in heroin and cocaine. We will mention only briefly his role as the man behind New York's first bootlegging operations — briefly, because the point requires no particular explanation. We *will* discuss his role as a gambler and a mastermind of securities fraud.<sup>6</sup>

Fixing the World Series was only one episode in Rothstein's career. He played the horses, played high-stakes craps and higher-stakes poker, and sometimes cut cards at \$40,000 a cut. He would bet on literally anything, from the serial numbers on dollar bills to the license plates on passing cars. He owned and managed gambling houses. On and off the race-course, he was to ordinary bookies what reinsurance companies are to the insurance trade.

As an underworld financier, Rothstein was the man who probably masterminded (or fenced) the Liberty Bond thefts of 1918-1920, in which \$5 million of bonds were stolen.<sup>7</sup> He was an insurance broker, appreciating the value of a business which offered a steady flow of cash and checks.<sup>8</sup> In the years bracketing World War I, moreover, he was the man who stood behind the bucket-shops of New York City.

A bucket-shop was a discount retail securities house. Some bucket-shops were legitimate; many others were not. These buck-

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5. See L. KATCHER, *THE BIG BANKROLL: THE LIFE AND TIMES OF ARNOLD ROTHSTEIN* 8 (1959).

6. On Rothstein's career, see generally D. CLARKE, *IN THE REIGN OF ROTHSTEIN* (1929); G. FOWLER, *THE GREAT MOUTHPIECE: A LIFE STORY OF WILLIAM J. FALLON* (1931); L. KATCHER, *supra* note 5; C. ROTHSTEIN, *NOW I'LL TELL* (1934) (memoir of Rothstein's widow).

7. See L. KATCHER, *supra* note 5, at 179. Arrested for these thefts, but never convicted, was Nicky Arnstein, then the husband of Fannie Brice. Arnstein insisted that he had been framed, which may well be true. *Id.* at 174-75, 180.

8. By some accounts, Rothstein used insurance as an enforcement mechanism. By requiring those who borrowed from him to take out insurance and name him as the beneficiary, he let his debtors know that they were funding the price he would put on their heads, should they default. See L. MORRIS, *INCREDIBLE NEW YORK: HIGH LIFE AND LOW LIFE OF THE LAST HUNDRED YEARS* 346 (1951). It seems as likely, if less dramatic, that Rothstein made himself his clients' insurer to prevent them from obtaining an independent source of capital by burning down their properties.

eteers were not above advertising their house stocks, knowing them to be worthless. A common practice was to make a phone solicitation, pocket the money, and postpone filling the order. If the customer's stock went down, the bucketeer could buy the shares at that lower price and keep the difference. If the stock went up, he would persuade the customer to roll over the money into a new investment.

Leo Katcher, Rothstein's biographer, wrote:

No official total of bucket-shop "take" has ever been compiled. Nat J. Ferber, the New York *American* reporter who did more to expose bucketeers and their activities than any other newspaperman, estimated their take in his book, *I Found Out*, as \$6,000,000,000. . . .

This much is on the record. In New York State, in one five-year period, bucket shops went into bankruptcy owing their customers more than \$212,000,000!<sup>9</sup>

To stay in business, the bucketeers needed protection, which Rothstein provided. When circumstances caught up with them, he was indispensable in providing bondsmen and lawyers.

In 1922 and 1923, the biggest of the bucketing scandals was constantly in the press. E.M. Fuller & Company, the largest brokerage house on the Consolidated Exchange, had gone into bankruptcy, owing its customers an amount estimated at \$5 million. The trials that followed — no fewer than four of them — brought out Rothstein's involvement with New York's bucket-shops. Edward M. Fuller awaited arrest in Rothstein's house, and Fuller's attorney was William Fallon. The firm's papers revealed that Rothstein had taken some \$425,000 out of the Fuller company's coffers.<sup>10</sup>

For the rest of Rothstein's life, attorneys kept asking him questions about his ties to Fuller. William Chadbourne, the receivers' attorney, grilled Rothstein intensely over whether he had bet with Fuller on the 1919 World Series. Chadbourne sought to show that Rothstein had bet on a fixed Series. This meant, he argued, that Rothstein had acquired the money under false pretenses, so that it therefore could be recovered for legitimate creditors.

Rothstein's answers suggested that he used gambling to launder money. Paying off fictitious bets was an easy way to pass dirty money from one hand to another. But in this case, the wager had been legitimate; triumphantly waving a canceled check, Rothstein proved that he had bet on the White Sox.<sup>11</sup> All Chadbourne could do was snap

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9. L. KATCHER, *supra* note 5, at 181.

10. See generally H.D. PIPER, "THE GREAT GATSBY": THE NOVEL, THE CRITICS, THE BACKGROUND 171-84 (1970).

11. L. KATCHER, *supra* note 5, at 200.

back that perjury obviously had no terrors for the witness.<sup>12</sup>

Here we find the connection to *Gatsby*. Scott Fitzgerald, after the success of *This Side of Paradise*, had become acquainted with the celebrities of New York City — a group that included the town's most prominent gambler. He would later recall that "[i]n *Gatsby* I selected the stuff to fit a given planned mood or 'hauntedness' . . . always starting from the *small* focal point that impressed me — my own meeting with Arnold Rothstein for instance."<sup>13</sup> In Great Neck, Long Island, where Fitzgerald wrote much of *Gatsby*, one can trace down another parallel. His neighbor, a man known for his society connections and his interest in aviation, was Edward M. Fuller — of E.M. Fuller & Co.

## II. AMERICAN PASTIMES

It is easy to gather why Fitzgerald decided that *Gatsby* would be involved with bootleg liquor and with stolen bonds. These were the most notorious crime waves of the day. A more revealing question is why Fitzgerald named fixing the World Series as the third of the crimes with which *Gatsby* is connected.

This may have been because he knew Rothstein and Fuller. While Fitzgerald was writing *Gatsby*, he saw Ring Lardner almost daily, and Lardner had been involved in uncovering the Black Sox scandal. But the most important reason is that Fitzgerald was a student of history, and recognized what baseball had come to mean to America.

Baseball, during the Progressive Era, had become more than a game.<sup>14</sup> It had become emblematic of America's social structure. Its teamwork showed democracy in action; its fans were found among all classes of society; it taught America's traditional values to successive waves of immigrants; and it served as an annual ritual which united cities behind their teams. Walt Whitman called it "the hurrah game," and continued:

[W]ell — it's our game; that's the chief fact in connection with it:

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12. See D. CLARKE, *supra* note 6, at 113-40. Stock-bucketeering and baseball gambling intersected at other points. Charles Stoneham, the owner of the New York Giants, was alleged to be a sleeping partner in E.M. Fuller & Co. Stoneham had made his money as a stock-bucketeer, and he would later handle the Havana end of a rum-running operation which Rothstein directed. It may not be coincidental that the Giants hired first baseman Hal Chase, who had been dropped from the Cincinnati Reds for trying to fix a game, and that Giants Manager John McGraw paid for the coffin in which William Fallon was buried. See L. KATCHER, *supra* note 5, at 192-93; H.D. PIPER, *supra* note 10, at 182-84; A. HYND, *DEFENDERS OF THE DAMNED* 182 (1960); see also E. ASINOF, *supra* note 4, at 14-15.

13. A. TURNBULL, *SCOTT FITZGERALD* (1962) (quoting Fitzgerald).

14. Chief among the social historians who have made this point is Steven Riess. See S. RIESS, *TOUCHING BASE: PROFESSIONAL BASEBALL AND AMERICAN CULTURE IN THE PROGRESSIVE ERA* (1980).

America's game: has the snap, go, fling of the American atmosphere — belongs as much to our institutions, fits into them as significantly, as our constitutions, laws: is just as important in the sum total of our historic life.<sup>15</sup>

Literature added sports heroes to the American pantheon. In dime novels, youngsters read of Frank Merriwell, the only man ever able to throw the double curve. In real life, they could read of baseball martyr Christy Mathewson. Mathewson, after the close of a legendary pitching career, resigned as manager of the Cincinnati Reds to go overseas in World War I. In a training accident, he became a victim of poison gas. This led to his death, from tuberculosis, in 1925.

The 1919 Series had been the first major sporting event in post-war America, and Fitzgerald had a life-long passion for sports. His first love was football (in particular, Princeton football), and he helped tie *Gatsby* together with motifs drawn from the athletic world. Jordan Baker is a professional golfer, about whom hangs a suspicion of cheating. Tom Buchanan was once one of Yale's most powerful ends, and the Buchanans' social environment is "wherever people played polo and were rich together."<sup>16</sup> The Black Sox scandal fit his fictional rhetoric.

If cheating and fixed games hover in the background of *Gatsby*, and securities fraud is just off-stage, so too is another shadow which marked the Twenties. *Gatsby's* role as a bootlegger casts him as a peripheral figure in one of America's boldest experiments in social and constitutional history: the short, unsteady life of the eighteenth amendment, better known as Prohibition.

Prohibition, nowadays, is remembered ironically; pronouncing the word carries the implication that it was foolish to try to ban the sale of alcohol. It is only later, intellectually, that one appreciates that Prohibition was an issue of constitutional magnitude. On July 17, 1919, the Constitution of the United States was amended to prohibit the sale of intoxicating beverages — and yet the people of the United States continued to buy intoxicating beverages. The law of the land was a popular nullity. To understand what this failure meant, in terms of American law, one must look back far before the Twenties.

### III. AMERICAN LAW: OLD FAILINGS AND NEW VISIONS

For American jurists, the original definition of law came from that suggested by Sir William Blackstone: law was a force which

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15. Folsom, *America's "Hurrah Game": Baseball and Walt Whitman*, 11 IOWA REV. 68, 77 (1980) (quoting Walt Whitman).

16. F.S. FITZGERALD, *supra* note 2, at 6.

commanded the right and forbade the wrong.<sup>17</sup> Law and morality were related, perhaps even coextensive.

In 1897 — when Scott Fitzgerald was one year old, and Arnold Rothstein turned fifteen — Oliver Wendell Holmes, Jr., proposed a radically different view. “I think it desirable,” Holmes wrote, “to point out and dispel a confusion between morality and law. . . .” He went on to urge that the two be divorced:

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience. . . .

. . . .  
 . . . The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.

. . . .  
 . . . The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, — and nothing else. If you commit a tort, you are liable to pay a compensatory sum.<sup>18</sup>

And by logical extension, if an act is criminalized, this means only that those who commit it run the risk of being jailed.

Holmes' comments laid the foundation for Legal Realism. During the early decades of this century, while this school of thought raised controversy within law schools, it seemed (with an odd, cynical precision) to restate the popular attitude. In the Twenties, to judge by the American people's response to Prohibition, morality seemed to have no part in law. No matter that Prohibition was enshrined in the Constitution; the population ignored this super-legal commandment. It was as if Holmes' bad man, who cared nothing about morality, but only about penalties, now defined the public's view of law.<sup>19</sup>

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17. Blackstone wrote: “[T]he primary and principal objects of the law are RIGHTS, and WRONGS. . . . I shall follow this very simple and obvious division; and shall, in the first place, consider the *rights* that are commanded, and secondly the *wrongs* that are forbidden.” 1 W. BLACKSTONE, COMMENTARIES \*122 (1783), quoted in D. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW 92-93 (1958).

18. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897). Holmes found other influences to replace morality. Historical understanding was one; hence *The Common Law's* historical aspects. Holmes' amorality, too, bowed to social science and quasi-science. He himself was a Social Darwinist, willing to let law be rewritten by emerging social groups. If law did not embody morality, it should reflect the evolutionary struggle. See Gordon, *Holmes' "Common Law" as Legal and Social Science*, 10 HOFSTRA L. REV. 719 (1982).

19. To be sure, other voices echoed Holmes. Roscoe Pound would talk about sociological jurisprudence. Charles Beard would frame the United States Constitution in an economic context, arguing with a great number of tables that it had been written by upper-class white men for upper-class white men. Jerome Frank would insist that judges decide cases on the facts, and that lower courts overruled the Supreme Court every day. See Hopkins, *The Development of Realism in Law and Literature During the Period 1883-1933: The Cultural Resemblance*, 4 PACE L. REV.



It was acceptable, the American people seemed to feel, to violate the Constitution. The result of the Black Sox trial, held in Chicago in the summer of 1921, seemed only to compound the irony. All eight of the White Sox players involved were acquitted. By the decision of that court, fixing the World Series, tampering with the faith of fifty million people, was not a crime.<sup>20</sup>

In *Gatsby*, one senses a similar moral vacuum. Characters muddle right and wrong, often willfully. People dislike dealing face-to-face with Myrtle Wilson, but they condone Tom Buchanan's keeping a mistress. Despite Nick's self-proclaimed honesty, he romanticizes Gatsby, although Gatsby is linked to the underworld and is obsessed with a woman married to someone else. Even on Wolfsheim (who talks matter-of-factly of gangland killings, and whose cuff buttons are made of human teeth), Nick speaks with moral detachment, as if lurching with gangsters were the same as watching strange beasts in a national park.

The law, not surprisingly, plays little part in Fitzgerald's novel. Only two policemen actually appear. One flags down Gatsby for speeding, then salutes and apologizes when Gatsby flashes the police commissioner's personal card. The second officer appears after Myrtle Wilson's death. Seriously but impotently, he takes down information, opening a case which will never be solved. Even retribution miscarries. At the novel's end, George Wilson desperately tries to avenge his honor and his wife's death; but Wilson is misled by the man who wronged him, and shoots Gatsby instead. Tom Buchanan, the cause-in-fact of a fatal accident and a murder-suicide, bears no legal responsibility for any of these deaths. Faced with this, Nick flees the East — and although this is hardly a solution, Fitzgerald suggests no better one.

#### IV. FROM MORALISM TO REGULATION

From the Black Sox scandal, baseball emerged as a hitter's game, thanks to a livelier ball, which made it possible for Babe Ruth to hit scores of home runs every season. The same years were a turning

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29 (1983); see also Golding, *Jurisprudence and Legal Philosophy in Twentieth-Century America — Major Themes and Developments*, 36 J. LEGAL EDUC. 441 (1986).

20. The trial was flawed by design; the prosecuting attorneys agreed to try the case only on the flimsiest possible theory. See E. ASINOF, *supra* note 4, at 197-275. Even without this knowledge, a Chicago editorial writer cut through to a conclusion reminiscent of Justice Holmes:

The law and the jury seem to say that the question in such a conspiracy is not what you do but what you can get away with. . . . A case like this might seem unimportant in comparison with disarmament, or world commerce, or the race problem, or prohibition. But at the bottom of every issue lies the national character.

Chicago Herald and Examiner, cited in E. ASINOF, *supra* note 4, at 274.

point for American law.<sup>21</sup> If law no longer meant morality, it would be reborn as governmental administration. If courts would not give justice, justice *would* be established — by other institutions, found throughout society.

Ten years after *Gatsby*, the modern superstructure of federal regulatory agencies would cover the American economic landscape.<sup>22</sup> Under this new regime, the test for legality would not be morality or justice; it would be technical compliance, whether one had followed directions. The income tax is the best example. Al Capone was jailed not because he ran bootleg liquor, or ordered the massacre of his enemies, or corrupted the politics of the city of Chicago; Al Capone went to Alcatraz because he omitted to pay his taxes.<sup>23</sup>

The Securities Act of 1933 also fell into this category. It brought the issuance of securities under the scrutiny of the federal government — not by establishing a police force, but by prescribing a process to be followed, securities registration. In creating causes of action, this statute made liability hinge upon an objective standard: misstatements of fact. No longer did one hunt for a conman's scienter; no longer did a plaintiff have to prove reliance. Good faith and betrayal had been factored out of the legal calculus.<sup>24</sup>

Regulation also ended the high-flying era of open gambling. The parallel is worth considering: the gambling and securities communities had largely overlapped.<sup>25</sup> Formerly, independent bookies had made their own odds and paid off bettors at different rates — but now all stakes were held by the track, a neutral party, and all bets were paid off at the closing odds. "Undesirable elements" might still be

21. Stephen Jay Gould makes this connection in his foreword to *Eight Men Out*. See Gould, *Foreword* to E. ASINOF, *supra* note 4.

22. It has been argued that Legal Realism, with its pragmatic approach, allowed American lawyers to accommodate themselves to administrative law as installed by the New Deal. B. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 17-38 (1984).

23. This would eventually have brought down, probably, Arnold Rothstein, who boasted of never having paid more than \$150 a year in federal income tax. See D. CLARKE, *supra* note 6, at 303.

24. See Securities Act of 1933 §§ 11, 12, 17 (codified at 15 U.S.C. §§ 77k, 77l, 77q (1982)). Of course, scienter and reliance found their way back into the Securities Exchange Act of 1934 — but even here one finds § 16(b), which inexorably recaptures all profits made by corporate insiders on trades made within six months. Section 16(b) was enacted to curb an abuse favored by one of *Gatsby's* regular guests, James B. "Rot-Gut" Ferret: "[T]hey came to gamble, and when Ferret wandered into the garden it meant he was cleaned out and Associated Traction would have to fluctuate profitably next day." F.S. FITZGERALD, *supra* note 2, at 62.

25. When Joseph "Sport" Sullivan sought to place a bet on the 1919 Series, he headed for the Chicago Board of Trade. E. ASINOF, *supra* note 4, at 36-37. In 1920, when gamblers spread rumors that the Yankees team had been involved in a train wreck, with Babe Ruth injured, this disinformation arrived over the private wire of W.E. Hutton & Co. *Id.* at 153. And this leaves to one side the Havana casino into which Charles Stoneham put much of his money.

involved, but now they had to work indirectly, facing the risks involved in public scrutiny.

Gaming commissions turned casinos into quasi-utilities. Just as government employees found their powers constrained by administrative procedures, so casino employees had their discretion limited. In Nevada's casinos, "dealers were instructed to play according to fixed rules set by the house so that they never matched wits against the players."<sup>26</sup> As much as any government regulation, these new standards were meant to ensure certainty and predictability — and the casinos, like the government, flourished.

The old idea of law had been fallaciously simple. (How did one know exactly what rights were commanded, or what was so wrong that it had to be forbidden?) This new-model law avoided that problem, but it placed too much faith in complexity and detail. Eventually, it was bound to go too far. Within two decades, its capacity for contradiction and paradox would be satirized by Joseph Heller, whose *Catch-22* presented a world where rules prevented action.<sup>27</sup> No matter how sophisticated the administrative schema, Heller would observe, there was bound to be a catch somewhere — and, inevitably, there *would* be.

#### V. LAW OUTSIDE LAW: THE RISE OF SELF-GOVERNING INSTITUTIONS

And as for the other shape which the new law took:

The Legal Realists argued that law was only a system which imposed sanctions. If that is true, the converse must also be true: any system which imposes sanctions has a claim to be recognized as law. Here the Realists found themselves poaching on another discipline's terrain. Rejecting law's ties to morality and religious revelation, the Realists studied it as an aspect of human behavior — and so found themselves working side-by-side with social anthropologists. It is no accident that *The Cheyenne Way*, a study of American Indian jurisprudence, was written by anthropologist E.A. Hoebel and arch-Realist Karl Llewellyn.<sup>28</sup>

Hoebel and Llewellyn wrote other books — certainly less idiosyncratic books — but *The Cheyenne Way* is noteworthy as a study in legal anthropology. While confessing how hard it was to define law, the two jurists tried yet again. It was wrong, Hoebel and Llew-

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26. D. BOORSTIN, *THE AMERICANS: THE DEMOCRATIC EXPERIENCE* 74 (1973).

27. J. HELLER, *CATCH-22* (1961).

28. E. HOEBEL & K. LLEWELLYN, *THE CHEYENNE WAY* (1941).

ellyn thought, to say that law necessarily involved action by "officials of the political state." Functionally, "the vital difference [lay] between that deviation which is rebuked and that breach which is not."<sup>29</sup> Where sanctions were enforced, there one found law. Statutes passed by legislatures and decisions handed down by judges were only part of the total: "The total picture of law-stuff in any society includes, along with the Great Law-stuff of the Whole, the sublaw-stuff or bylaw-stuff of the lesser working units."<sup>30</sup>

In America, private institutions had taken on a quasi-legal role. The rise of the press illustrated the point. Once, newspapers had called themselves *The Advertiser* or *The Democrat*, admitting that they were commercial listings or political organs. By the turn of the century, however, they had declared their independence. (Or, at least, their headstrong self-will.) Now newspapers were political watchdogs. They would lobby for their chosen causes, rake muck against any candidate — even start wars, if their publishers chose. Their power was recognized with the sobriquet of the Fourth Estate, which implied that they were constitutional bodies.<sup>31</sup>

Even baseball found itself growing into this role. Before becoming baseball commissioner, Kenesaw Mountain Landis had been a federal judge. In assuming this new jurisdiction, he may have felt compelled to fill a vacuum. The very next year, Justice Holmes would declare that baseball was not interstate commerce, and so not subject to the antitrust laws.<sup>32</sup> The contract which Landis wrote for himself (with lifetime tenure, financial security, and absolute power, above the politics of baseball leagues) duplicated his previous status. Technically, Landis remained a private citizen, and baseball remained only a popular pastime — but as its organization became effective, it increasingly mirrored the structures of political government.

29. *Id.* at 23-24.

30. *Id.* at 28.

31. This point is captured wonderfully in the classically Progressive motto of Joseph Pulitzer's *St. Louis Post-Dispatch*, which still appears on its editorial page each day:

THE POST-DISPATCH PLATFORM

I know that my retirement will make no difference in [the *Post-Dispatch's*] cardinal principles, that it will always fight for progress and reform, never tolerate injustice or corruption, always fight demagogues of all parties, never belong to any party, always oppose privileged classes and public plunderers, never lack sympathy with the poor, always remain devoted to the public welfare, never be satisfied with merely printing news, always be drastically independent, never be afraid to attack wrong, whether by predatory plutocracy or predatory poverty.

April 10, 1907

Joseph Pulitzer

32. *Federal Baseball Club of Baltimore v. National League of Prof. Baseball Clubs*, 259 U.S. 200 (1922). Or was Landis trying to take the sport outside the sphere of government regulation? Before the scandal, as a judge, he had himself stalled action on antitrust suits against organized baseball.

With this in mind, one should look at how the Black Sox scandal finally found its resolution. The day after the verdict in the Chicago trial, Commissioner Landis issued this edict:

Regardless of the verdicts of juries, no player who throws a ball game, no player that undertakes or promises to throw a ball game, no player that sits in conference with a bunch of crooked players and gamblers where the ways and means of throwing a game are discussed and does not promptly tell his club about it, will ever play professional baseball.<sup>33</sup>

Landis spoke with the finality of formal government; none of the Black Sox ever again played professional baseball.

The Commissioner's findings were challenged (implicitly) in lawsuits brought by Buck Weaver and Shoeless Joe Jackson. Both sued White Sox owner Charles Comiskey for the balance due on their employment contracts — arguing that they had always played to the best of their ability, and so had not breached their agreements with him. Neither prevailed. Weaver lost his suit (although he badgered Comiskey into a settlement). Jackson won a jury verdict, which the judge set aside.<sup>34</sup> Outside the court, Weaver met repeatedly with Landis, urging mitigating circumstances, and Jackson's fans petitioned to have the case reviewed. Neither of these approaches changed one syllable of the decree.

As Hoebel and Llewellyn remind us, *law* is not only formal law; it can be found in the customs, traditions, and other value structures of a society. In this broader meaning, as Fitzgerald sensed, what the Black Sox did violated the law. Their suspension by Landis was a rebuke of this violation. The legitimacy of this decision — and the legitimacy of the new order of law — is shown by the fact that the order was never undone by any court. Eventually, even federal courts, even when constitutional rights were involved, would explicitly defer to the judgment of sports officials.<sup>35</sup>

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33. E. ASINOF, *supra* note 4, at 273 (quoting Landis).

34. Although substantive law had proved unable to handle the Black Sox affair, adjective law took an inexorable vengeance. Weaver's case was dismissed when his lawyers failed to appear in court. Jackson's verdict was set aside because, the judge said, the plaintiff had perjured himself, telling one story to the grand jury that had indicted the Black Sox, and another on the witness stand. E. ASINOF, *supra* note 4, at 279-92.

35. In 1961, for example, Judge Irving Kaufman would find that a professional sports league "could reasonably conclude that in order to effectuate its important and legitimate policies against gambling, and to restore and maintain the confidence of the public . . . it was necessary to enforce its rules strictly." The reason, at bottom, was that "every league or association must have some reasonable governing rules." *Molinas v. National Basketball Assn.*, 190 F. Supp. 241, 243-44 (S.D.N.Y. 1961). Witness also the dispute over where constitutionally implied rights of privacy should yield to the need to keep sports clean by policing drug use. See, e.g., Cochran, *Drug Testing of Athletes and the United States Constitution: Crisis and Conflict*, 92 *DICK. L. REV.* 571 (1988).

In 1989, organized baseball eked out a victory over both state courts (too eager, perhaps, to please local voters) and a federal bench drilled to respect due process and individual rights.

## VI. THE NEW METROPOLIS

Looking back to Scott Fitzgerald, it is eerie how well *The Great Gatsby* predicted the end of the Twenties. Arnold Rothstein died in 1928, mortally wounded as he left a poker game in a Manhattan hotel. Documents found among his papers showed the connection between Tammany Hall and the underworld. These scandals brought to office the reform administration of Fiorello LaGuardia, and brought to national prominence New York Governor Franklin Delano Roosevelt.

The Liberty Bond boom of the early 1920s touched off the stock-market speculation which characterized the rest of the decade. This helped cause the Great Depression, and led, in turn, to the securities legislation of 1933 and 1934.

In the middle of the Jazz Age, Fitzgerald had foreseen that the music was bound to stop. The political and financial elites had been humbled; the old order had been brought low. And the new metropolis, even while Fitzgerald was writing *Gatsby*, was already rising.

Part of *Gatsby's* modern appeal is its portrait of vanished Long Island: a working countryside, set off from New York by the growing town of Queens. The roads are nineteenth-century lanes. In investigating the deaths that close the novel, the police can ascertain which cars took a given route, and when. Yet within one generation, modern highways would criss-cross Long Island, and its villages would become New York City's suburbs — thanks to Robert Moses, America's greatest builder of public works.

In 1923, Moses was surveying parkway routes across Long Island. In the next four decades, he would change the shoreline of Manhattan Island, link the outer boroughs with bridges and tunnels, blast expressways through miles of apartment houses. Moses gave New York City its parklands and beaches; he tore down old neighborhoods and raised up new ones; he created Lincoln Center and the South Bronx.<sup>36</sup>

Moses controlled New York's public authorities: the Triborough Bridge Authority, City Tunnel Authority, City Housing Authority, City Planning Commission, State Public Works Department, State Power Authority, State Council of Parks, and other government boards. He would be known as "the Coordinator." This referred to

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Commissioner A. Bartlett Giamatti, after a free-wheeling jurisdictional squabble, cut short a case which seemed bound for months of litigation by banning Cincinnati Reds Manager Pete Rose from the game for life for allegedly betting on games. See Chambers, *Pete's Fans Learn What Lawyers Do*, Natl. L.J., Sept. 11, 1989, at 13; *He's Out!*, N.Y. Post, Aug. 24, 1989, at 1.

36. See R. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* 2-21 (1974).

his position as City Construction Coordinator, and acknowledged his role as the man who shaped the new New York.

Public authorities, originally, had performed the ministerial work of government. They covered only single projects (if a bridge or a turnpike were needed, an authority would be set up to build it), and they went out of existence when those projects were paid for. Moses changed all that. He won for public authorities the power to refinance their bonds, which gave them perpetual existence. He won for them the right to keep collecting commuters' dimes and quarters, even after every project had been paid off. Finally, he made authority decisions unreviewable by sealing them with bond indentures, agreements which the Contracts Clause protected against governmental second-guessing.

To build Long Island's parkways, Moses assumed the power to acquire acreage without a prior hearing and without prior payment — simply and literally, by sending men onto land, declaring it confiscated, and telling the owner to apply for compensation. This was comprehended by the legislative declaration that the Long Island State Park Commission might acquire land by appropriation “in the manner provided by section fifty-nine of the conservation law.”<sup>37</sup> The power to construct thoroughfares “connecting” with the Triborough Bridge, the power to build and operate public projects “not inconsistent” “with the use” of the Triborough Bridge — these elastic terms gave Moses the power to plan an entire city, which he ruthlessly exercised.<sup>38</sup>

In an age of statutes and regulations, those people rule who know the laws' hidden meanings — those people who have mapped out, through a circuit of obscure connections, the lines along which power flows. Moses showed how draftsmanship could be cryptography and how personal control could be relayed through the forms of government administration. Rothstein had worked in the gaps of law; Moses worked behind its structures.

In Middle Queens, in the days when he was building parks, Robert Moses found 127 vacant acres — part of the estate of Arnold Rothstein. Rothstein's money had vanished. The land remained, the only tangible portion of his legacy, but it lay under a heavy tax lien. So Moses, his biographer wrote, worked out a typically double-handed arrangement

under which the city “bought” 74 of the 127 acres for \$334,000 but the estate paid the \$334,000 back to the city to clear the tax deficiency on all 127 acres, leaving the estate with 53 acres free and clear — and the city

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37. *Id.* at 174.

38. *Id.* at 627. *See generally id.* at 615-36.

with a 74-acre "Juniper Valley" park which it had acquired without a cent of cash outlay.<sup>39</sup>

The new model of law had succeeded the old. Symbolically and functionally, the Coordinator became the gangster's heir.

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39. *Id.* at 377.