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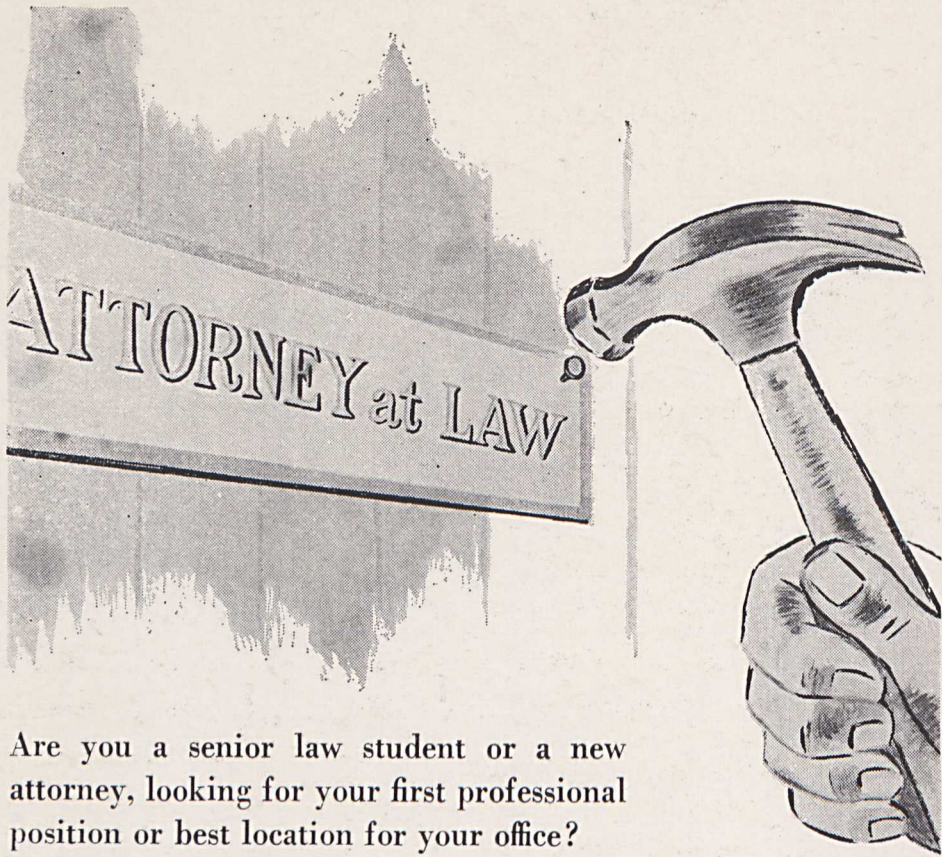


LOYOLA DIGEST

*LOYOLA SCHOOL OF LAW
LOS ANGELES*

Volume 1, Number 1

Fall—1965



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LEADING ARTICLES

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OPEN LETTER TO ALL STUDENTS

"How doth the little crocodile
Improve his shining tail,
And pour the waters of the Nile
On every golden scale!
How cheerfully he seems to grin,
How neatly spreads his claws,
And welcomes little fishes in,
With gently smiling jaws!"^[1]

On behalf of the Faculty and the Administration, I welcome the largest group of students in Loyola's 45 year history.

I wish to point out to the new students in particular that whether the next several years involve more "grin" than "claws," or vice versa, depends largely upon you. Your professors begin with the assumption that each student is intelligent, diligent, cooperative and has a sense of humor. Only you can prove they are wrong with respect to each or all of such adjectives. Make an effort to know your teachers in and out of class.

There is no "suggestion box" or "problem box" outside the Dean's office, and we have no couches. But all students, new and old, will do well to remember that discussion of a problem with professors or deans cannot hurt, and may help you.

1. Lewis Carroll—Alice's Adventures in Wonderland (1865)



J. REX DIBBLE
Dean

You have available an excellent library, interested and competent library personnel, good facilities for study and research, a new and comfortable building. You have decided to invest three or four years time and a substantial amount of money in the study of the law. Don't short-change yourself.

Good luck.

J. Rex Dibble
Dean

FACULTY HONOR AWARD PRESENTED

This year the annual Faculty Honor Award was presented to Patrick Lynch of the Third Year Class Day Division. This award is presented by members of the faculty to the outstanding third year student who they feel is deserving of particular recognition.

This award is unique in that the contributions come entirely from the faculty members, both full-time and part-time. In deter-

mining who the recipient shall be, the faculty consider the student's overall scholastic record together with his work in Legal Writing II. This year the presentation amounted to \$565.00 and was given at the monthly faculty meeting.

The Digest wishes to express its warmest congratulations to Patrick Lynch for his superior scholastic achievements here at Loyola.

LOYOLA DIGEST

INHERITANCE AND GIFT TAX LEGISLATION—1965

By *Alan Cranston*
STATE CONTROLLER

INHERITANCE AND GIFT TAX DIVISION LEGISLATION—1965

1965 legislation which becomes effective on September 17, 1965, makes the following changes affecting administration of the inheritance and gift tax laws.

DEFINITION OF COMMUNITY PROPERTY FOR INHERITANCE AND GIFT TAX PURPOSES

In applying the inheritance and gift tax laws, community property resulting from conversions of separate property by gift or agreement of the spouses has been treated in the same manner as ordinary community property acquired as such during marriage from earnings, etc. The 1965 legislation provides for different treatment of community property resulting from a conversion of one of the spouse's separate property. Where such a conversion has been effected, each spouse's interest shall, for inheritance and gift tax purposes, be treated as separate and not as community property. This change was affected by adding new Sections 13560 (inheritance tax) and 15310 (gift tax) to the Revenue and Taxation Code.

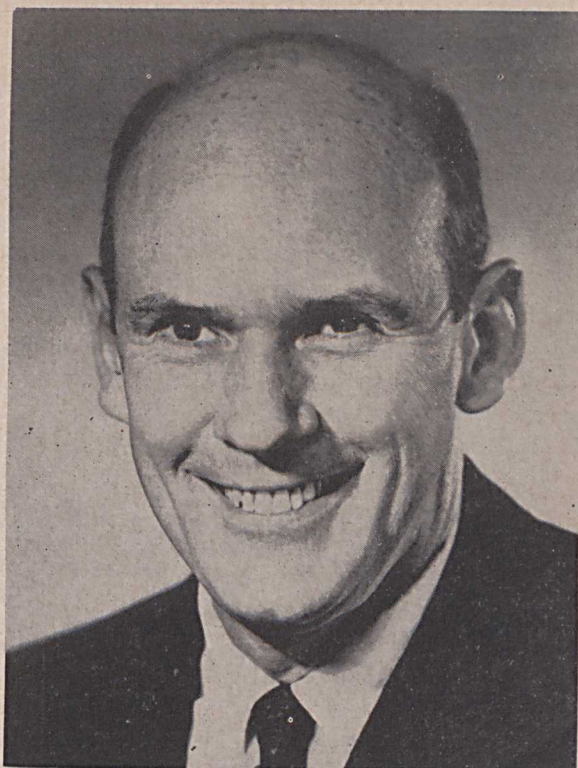
Text of the new sections:

13560. If one spouse makes a gift of an interest in separate property to the other and the interest so given, together with an equal interest retained by the donor, becomes their community property, such equal interests shall be treated as held by them as their separate property, and not as community property, for purposes of this part.

15310. Reads the same as Section 13560.

NOTE: The Department will take the position that these provisions apply not only to

FALL, 1965



ALAN CRANSTON
State Controller

the identical property converted but to the rents, issues and profits thereof as well. The new sections do not, of course, alter the character of the property for purposes of distribution. The converted property will maintain its community character in applying provisions of a will or the laws of succession to determine amounts distributable to heirs and legatees. It is treated as separate property only in applying the tax provisions to the amounts so distributed.

COMMUNITY PROPERTY— INHERITANCE TAX

(1) COMMUNITY PROPERTY PASSING TO A SPOUSE

Under pre-1965 law, as amended in 1961, all community property passing to a spouse

was excluded from inheritance tax with the exception that a decedent husband's half of the community property was subject to tax in the event he gave his wife a life estate or power of appointment therein.

The 1965 amendments now increase the excluded portion by further narrowing the exception. Under the new law a life estate given the wife in the husband's half of the property will also be excluded. The decedent husband's transfer of a power of appointment in his half of the community property to his wife remains taxable under the 1965 amendments as it was under prior law with, however, an exception in cases where she is given an interest in the property in addition to the power itself. Under the new law, where the wife is given an interest in the property in addition to the power, that portion of the property subject to the power is excluded which is equal to the value of the additional interest given the wife or to the value of a life estate in the property for the life of the wife, whichever is less. The typical case to which this provision will be applicable is one where the decedent husband gives his wife a life estate in his half of the community property with a power of appointment over the entire half. In such instances the life estate will be excluded and the value of the remainder will be taxed to the wife as donee of the power.

These changes were effected by amending Revenue and Taxation Code Sections 13551 (a), 13554 and 13692 ,renumbered 13694) and repealing Section 13552.

(2) COMMUNITY PROPERTY PASSING TO OTHERS

Prior to the 1965 amendments, Revenue and Taxation Code Section 13551 (b) provided, "All of the community property passing to anyone other than the surviving spouse is subject to this part." From the inception of our inheritance tax, this provision and its counterparts in prior inheritance tax laws have been interpreted by the Department and by taxpayers at large to mean what it says, i.e., that community property passing to others is taxable whether it is the decedent's interest, the

surviving spouse's interest or both. Section 13551 (b) as so interpreted has been amended both by "judicial legislation" resulting from the recent decision in *Estate of Carson*, 234 A.C.A. 594, and by the 1965 amendments. *Estate of Carson* held that Section 13551 (b) applied only to the decedent's half of the community property and the wife's portion passing to third persons (for example, by virtue of her election to take under a husband's will so disposing of her interest) could not be taxed under Section 13551 (b) as the husband's transfer. The 1965 legislation accomplished the same result by amending Section 13551.

Text of the amended section:
13551. Upon the death of a spouse:

* * *

(b) All of the decedent's half interest in the community property passing to anyone other than the surviving spouse is subject to this part.

NOTE: Although the amendment is applicable only to decedents dying subsequent to its effective date, September 17, 1965, the law change, by virtue of the *Carson* decision, is effective as to all cases in which the tax has not been fixed.

This change in the treatment of community property passing to others will have a gift tax effect. Where, in election cases, beneficiaries other than the wife receive all or a portion of her share of the community property which is no longer subject to inheritance tax as the decedent husband's transfer, such property will be subject to gift tax as a transfer from the wife.

COMMUNITY PROPERTY—GIFT TAX

(1) DONOR'S GIFT OF COMMUNITY PROPERTY TO SPOUSE

Prior to the 1965 amendments, a donor's transfer of his interest in community property to his spouse was subject to gift tax in the same manner as any other gift. The new law, by amending Revenue and Taxation Code Section 15301 and adding Section 15301.5, now exempts transfers of community property to a spouse.

Text of the amended and new section:

15301. In the case of a transfer to either spouse by the other of community property, none of the property transferred is subject to this part.

15301.5 In the case of a transfer to either spouse by the other of quasi-community property, one-half of the property transferred is subject to this part.

NOTE: Under prior law both community property and quasi-community were covered in a single section, i.e., 15301.

(2) CONVERSION OF SEPARATE PROPERTY TO COMMUNITY PROPERTY

The 1965 amendments repeal Revenue and Taxation Code Section 15303. The purpose of Section 15303 was to recapture as gift tax the inheritance tax lost by application of the community property exclusion to community property which had been converted from the separate property of the decedent prior to death. In such cases, Section 15303, in addition to levying a gift tax upon one-half the property at the time of conversion, also levied a gift tax upon the other half at the date of decedent's death as though the decedent's half of the community resulting from the conversion were transferred at death by gift instead of inheritance.

Pursuant to repeal of Section 15303 we shall no longer assess gift tax upon the half of the community property passing at death. We shall continue, however, to assess the tax upon one-half the property at the date of conversion, since this transfer remains subject to tax pursuant to general provisions of the law.

Under prior law, in order to collect tax upon the full amount of the death-gift transfer, the \$4,000 annual exemption was disallowed with respect thereto by Section 15402. With repeal of Section 15303, it was also necessary therefore to eliminate from Section 15402 as surplusage the provision disallowing the annual exemption.

POWERS OF APPOINTMENT— INHERITANCE TAX

It has always been difficult to apply an inheritance-type death tax to powers of ap-

pointment because of the problem of determining the identity of the ultimate beneficiaries against whom the tax should be assessed. Historically, California has solved the problem in one of two ways—one, by taxing the gift of the power in the estate of the donor as though the property passed outright to the donee of the power and two, by assessing no tax upon the gift of the power but waiting until the donee's death and taxing his exercise of the power in his estate as though the ultimate beneficiaries (appointees) received the property by inheritance from him. Over the years California has gone back and forth from one method to the other. The present method, number one, has been in effect since 1935.

The 1965 amendments repeal and re-enact Chapter 4, Article 5 (commencing with Section 13961) which contains the power of appointment sections. No change is made in the present method of taxing the gift of a power of appointment in the estate of the donor. As indicated above, it is taxed as a transfer of the property to the donee of the power. The amendments retain this tax on the gift of the power and in addition tax the exercise or non-exercise of certain general powers of appointment in the estate of the donee or holder of the power as though the property subject to his power passed by taxable transfer from him to his appointees (in cases where he exercises the power) or to the persons who take in default of exercise (in cases where he fails to exercise the power).

The policy of the new law is to apply the tax to those general powers which are so broad that they vest virtual beneficial ownership of the property in the donee of the power. The situation in such cases is little different than if the property had passed outright by inheritance first from the donor of the power to the donee and then from him to the ultimate takers. It should, therefore, be taxed in both estates.

Taxation of general powers in the estate of the donee or holder of the power is affected by adopting the federal estate tax provisions pertaining to the subject with certain changes tax. The provisions are rather complex. We

to conform them with our inheritance-type shall, however, have federal estate tax decisions and regulations to guide us in the interpretation problems which will arise.

The new law specifically defines the powers which are subject to tax in the estate of the donee of the power and calls these "general" powers. All other powers are called "limited" powers. In substance, the general power as defined is one which is exercisable by the decedent-donee of the power in favor of himself, his estate, his creditors or the creditors of his estate. The definition is further refined to cover special situations where the power is held jointly by more than one person. Provision is also made for taxation of general powers which the donee exercises or releases prior to death under circumstances which, if it were a transfer of the property itself, would be subject to tax as an inter vivos transfer under other sections of the law (for example, exercise or release in contemplation of death).

CHARITIES—INHERITANCE TAX

Revenue and Taxation Code Section 13842 provides basically that transfers to charitable institutions or in trust for charitable purposes are exempt from inheritance tax if (1) the institution or trust is organized solely for charitable purposes under the laws of this state or (2) the property is limited for use in this state. In *Estate of Fleming*, 31 c 2d 514, the court held that a transfer to First National Trust & Savings Bank of San Diego as trustee for charitable purposes not limited for use in California was taxable because the bank was not organized solely for charitable purposes.

CHARITIES—GIFT TAX

The corresponding charitable exemption provision (Revenue and Taxation Code Section 15442) was amended by the 1965 legislation to conform to the amendment of inheritance tax Section 13842 as above described.

Text of amended section:

The wording of the amending phrase is the same as that contained in Section 13842.

NONRESIDENT DECEDENTS' INTANGIBLES—INHERITANCE TAX

Prior to 1935 certain intangible property "located" in California or subject to its jurisdiction (for example, stock of California corporations) belonging to a decedent who was not a resident of California was considered subject to our inheritance tax. In order to attain reciprocity with other states who did not tax California decedents' intangibles "located" there, reciprocity provisions similar to those contained in present Revenue and Taxation Code Section 13851 were added to the Inheritance Tax Law in 1927. The Inheritance Tax Act of 1935 completely rewrote the inheritance tax law. The provisions thereof which imposed the tax became susceptible to the interpretation that only the intangibles of deceased nonresidents of the United States were taxable (unless the reciprocity provisions were applicable) while the intangibles of decedents who were residents of states of the United States other than California were exempt from tax in any event. Since 1935 the provisions imposing the tax (presently contained in Section 13303) have been so interpreted by the Department. (See Regulation 13303 (c).)

Although such has been the interpretation since 1935, the reciprocity provisions were never amended to conform thereto. As a result they make unnecessary reference to reciprocity with other states of the union in the taxation of nonresident decedents' intangibles. This tends to throw doubt upon the interpretation of Section 13303 that such intangibles are basically exempt independently of reciprocity.

To correct this condition the 1965 legislation amends Section 13851 to make it clear that the reciprocity provisions apply only to deceased nonresidents of the United States and that intangible property of sister state residents are basically not subject to California inheritance tax in any event. The amendment therefore makes no actual change in the law as presently interpreted.

THE FREE SPEECH QUESTION IN THE SUBSCRIPTION TELEVISION CONTROVERSY

By Horace V. McNally, Jr.

I. Introduction

In July, 1964, a new form of entertainment appeared in California as Subscription Television, Inc. (STV). An idea which had been discussed and debated for years became a short-term reality as STV combined with the Pacific and General Telephone companies to transmit paid television into viewer's homes via coaxial cable. These closed circuit programs offered a special attraction to the selective television watcher for STV made available shows and events which were not able to be seen anywhere else on T.V.

But in order to present these hand-picked shows which admittedly did not have mass media appeal, STV had to rely on the revenues produced by directly charging the individual subscriber, rather than sponsored advertisements. This direct assessment of the television viewer disturbed many people especially the independent theater owners who envisioned their share of the public's dollar measurably reduced by subscription television competition. To combat this attack, the theater owners introduced an initiative to Californians.

The proposed law, entitled "An Act to Preserve Free Television in California," was extensively advertised and came to be commonly known as the "Free Television Act." This Act outlawed the operation of subscription television for home reception in this state. On November 3, 1964, the voters of California adopted this initiative under the ballot designation of Proposition 15.

The California Supreme Court is now considering the question of whether such a prohibition by legislation is valid, or whether it abridges freedom of speech and expression and is consequently invalid under the Fourteenth Amendment of the Constitution of the United States, and Article I, Section 9, of the

California Constitution. This is the issue which we shall consider here as it applies to STV. Our treatment of it may seem one-sided, but it is intended to be in order to examine a most interesting facet of the case for STV.

II—Establishing the Right to Freedoms

Freedom of speech is expressly protected by the First Amendment and is applied to the individual states by the due process clause of the Fourteenth Amendment, which also assures "liberty" thus guaranteeing freedom of expression. These freedoms are two of the most basic and essential personal liberties protected from state infringement. The "liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action."¹

The Constitution of the state of California protects the same rights.² But are these rights which are clearly possessed by STV being infringed upon by the Free T.V. Act? It appears that they are.

In the first place, a right to free speech is an empty phrase without some effective method of expressing one's ideas. So included within the area of the Fourteenth Amendment protections are the means by which speech is communicated to others.³ Also encompassed is the content of the ideas transmitted by the speech, for if this were changed, free speech would again be no more than a series of words.⁴

It has been further established that broadcasts over radio and television are entitled to the protections of the First Amendment.⁵ To hold otherwise would be to deny guaranteed freedoms to one of the most important influencing forces in our society.

STV argues that the guaranteed protection of the Constitution are not lost or affected merely because there is a charge made for the reception of television programs.⁶ Such a conclusion seems elementary for if speech or press had to be cost free to be protected, then motion pictures, books, newspapers, and the like could no longer operate within the scope of the Fourteenth Amendment. Such a conclusion is absurd.

III—Restriction of Constitutional Rights

Now that the existence of STV's primary rights under the First and Fourteenth Amendments have been explicated, the question follows whether STV can be deprived of these rights or can they be restricted by a majority of the voters.

Since we are concerned here with basic constitutional rights, the fact that the voters passed Proposition 15 does not remove the Free T.V. Act from the light of the court's examination. "One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to a vote; they depend on the outcome of no elections."⁷ The court in the *Barnette* case⁸ explained that it is the very purpose of the Bill of Rights to withdraw certain subjects from the arena of political controversy and "to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."

In scrutinizing the restrictions put on STV by the voters, the court must keep in mind that the right to free speech and expression cannot be hindered or prohibited by state law unless there is a real danger present, and even then only to the extent necessary to abate that danger. The Supreme Court has used various standards to control the actions of the states in this area.

The first guide which was used by the Supreme Court in relation to the First Amendment freedoms was the "bad-tendency test." In *Gilow vs. New York*,⁹ the court said that it is within the proper exercise of the state police power to punish those "who abuse this freedom by utterances inimical to the public morals, incite to crime, or disturb the public peace . . ." So during that period of our judicial history, the state could restrict freedoms at the first indication that their exercise would be harmful to the society at large. The court has since abandoned this criteria.

The next standard applied was the "clear and present danger test", which was originated by Justice Holmes.¹⁰

"The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

This test was modified in *Bridges Vs. California*.¹¹ There the court emphasized that when applying restrictions on free speech it is not enough that a substantive evil will result, but that the evil must be "substantial". The case continued stating that the "substantive evil must be extremely serious and the degree of imminence extremely high before the utterances can be punished." "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."¹²

Although this test has not been abandoned by the court, it has been significantly re-evaluated for the element of balancing has been added. The court must now consider "whether the gravity of any such evil, discounted by its improbability, justifies invasion of freedom of speech in order to avoid the danger."¹³ This is the criteria which the court will use today. So if there is in fact a prohibition of the freedoms of speech and expression placed on STV, such restrictions must be weighted by the court according to the balancing standard.

To begin with, the state of California argues that the Free T.V. Act does not prohibit subscription television in homes, but only provides that no charge be made for such telecasts. This, however, is just a technical consideration. Forcing STV to provide free entertainment results in a de facto absolute prohibition of STV. The Act has eliminated STV's sole artery of revenue, and without the ability to charge the individual, STV would be like a movie house unable to require admission. The films would have to be shown free or not at all, and since the latter alternative would bankrupt the owner, closing down would be the only solution.

Neither does the Act simply regulate the business of STV in a reasonable and non-discriminatory way. For example, the Fair Labor Standards Act and National Labor Re-

lations Act have been applied to the businesses of radio and television, but their enforcement does not prohibit the exercise of personal freedoms. In addition, these acts apply universally to the entire trade or business. The Free T.V. Act goes much further and completely denies operation to STV for failure to comply with the state rule, while at the same time, the Act specifically exempts theater subscription television from its confines.

IV—*Validity of Restriction on Constitutional Rights*

Since such a prohibition against STV is evidently in force under the Act, we must determine whether this prohibition is valid by the use of the balancing test. The main problem is in discovering a real evil, for the "evil" described by the state of California and the advocates of Proposition 15 is largely speculative and illusory.

The language of the Free T.V. Act itself is vague and uninformative. It asserts that the development of any subscription television business would have an adverse effect upon presently licensed TV. stations. What this "adverse effect" is, or what its extent will be has never been established, but has merely been a matter for speculation. Indeed a reading of the Report of Hearings on Subscription television, 85th Congress, 2nd Session, contains only a few mirage-like statements that "subscription television may destroy some free television operations." If such a foremost legislative body has no further idea than this of the effects of subscription television, then such shadows are hardly the substantive evil which would justify a prohibition of personal freedoms guaranteed by the First and Fourteenth Amendments.

The Act continues that subscription television would "tend to" deprive the public of their present freedom of choice regarding T.V. programs, and that it would "tend to" create a monopoly. It is difficult to imagine how the adding of an additional three television channels to an area and increasing the viewer's choice will even remotely "tend to" restrict freedom of choice. Nor does it appear possible that STV in its infant stage

would have the power to create a monopoly, if indeed it ever would have such a capability, which again is a matter of pure conjecture. Rather, it seems that the theater owners are eliminating their competition by the Free T.V. Act, thus creating their own monopoly. In any event, the Act itself is so vague that the "evils" are certainly discounted by the probability.

V—*Related Problems*

Several related considerations should also be mentioned briefly. First, there is a question whether the Free T.V. Act imposes a prior restraint on speech and expression. If the Supreme Court finds such a prior restraint, the law imposing it carries a strong presumption of invalidity.¹⁴

Second, it is argued that the Free T.V. Act discriminates against STV and in favor of the competing media by eliminating STV's method of revenue, while leaving commercial and theater T.V. untouched. It is contended that this violates the constitutional provision relating to free expression.

Finally, STV argues that there should be no total prohibition of a means of communicating free speech and expression unless it is very clear that a less constricting method would be ineffective. Even though the government might have a legitimate purpose in imposing the restrictions, a broad means hindering fundamental liberties should not be used when a narrower method is available.¹⁵ For example, in *Saia vs. New York*¹⁶ an ordinance against sound trucks was held invalid because the law itself failed to specify the standards to be used in applying. This gave the enforcer absolute discretion, and therefore it amounted to a total prohibition. But if a more clearly selective and accurate measure had been used, then the law could be valid. The Free T.V. Act, however, prohibits all subscription T.V. no matter how small or at what capacity they are operating, with the exception of theater television. But if the stated purposes of the Act may be accomplished by less restrictive measures or by traditional legal methods, then a total elimination would be improper.¹⁷

VI—Conclusion

The foregoing is a sketch of the case for STV. But the problems concerning the First and the Fourteenth Amendment do not constitute the entire controversy between STV and the State of California, but only one part of it.

The issues presented in this paper have already been decided in favor of STV in the Superior Court of Sacramento County,¹⁸ and the Supreme Court of California will be reviewing the case shortly. In the opinion of the author, the decision should be affirmed on the ground that the rights of STV to free speech and expression have been unconstitutionally infringed upon by the Free T.V. Act.

NOTES

1. *Near v. Minnesota* 283 U.S. 697, 707 (1931)
Gitlow v. New York 268 U.S. 653 (1925)
2. *Katzev v. County of Los Angeles*, 52 Cal. 2d 360 (1959)
3. *Wollam v. City of Palm Springs*, 59 Cal. 2d 276 (1963)
4. *Kovacs v. Cooper* 336 U.S. 77 (1949)
Baltimore Radio Show, Inc. v. State 193 Md. 300, 67 A. 2d 497, cert. den. 338 U.S. 912 (1949)
5. *American Broadcasting Company v. United States* 110 F. Supp 374, (S.D.N.Y., 1953), Affd. 347 U.S. 284
6. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952)
New York Times v. Sullivan, 376 U.S. 254 (1964)
Smith v. California, 361 U.S. 147
7. *West Virginia State Board of Education v. Barnette* 319 U.S. 624, 639 (1943)
8. *Ibid*—*Barnette* case
9. *Gitlow v. New York*, 268 U.S. 652 (1925)
10. *Schenck v. United States* 249 U.S. 47, 52 (1919)
11. *Bridges v. California* 314 U.S. 252 (1941)
12. *Thomas v. Collins* 323 U.S. 516, 530 (1945)
13. *Katzev v. County of Los Angeles*, 52 Cal. 2d 360 (1959)
Dennis v. United States 341 U.S. 494 (1951)
14. *Bantam Books, Inc. v. Sullivan* 372 U.S. 58 (1963)
15. *Shelton v. Tucker*, 364 U.S. 479 (1950)
16. *Saia v. New York* 334 U.S. 558 (1948)
17. *Marton v. Strughers* 319 U.S. 141 (1943)
18. *Weaver v. Jordan*—Sup Ct of Calif. Sacramento County Memo Opinion No. 155760

A.L.S.A. SUMMER CONVENTION

What is ALSA? ALSA is the American Law Student Association. It is an organization of over 130 student bar associations representing a majority of the law schools in the United States. The purposes and objectives of this Association are: "1. To introduce students to the professional problems and responsibilities they will face after admission to the practice of law; 2. To coordinate students projects and ideas for initiating and improving activities of this Association and its member organizations; 3. To promote the idea of professional responsibility and to acquaint law students with the opportunities and obligations present to serve the public and to improve the administration of justice through the organized Bar; 4. To acquaint law students with the nature and activities of the American Bar Association and of local and State bar associations; to foster a closer relationship between the future lawyers and present members of the legal profession; and to train law students for future participation in the American Bar Association, its Junior Bar Conference and the local and State bar associations; 5. To initiate and to promote the aforesaid activities to the end that the best interests of the law student and the legal profession are served."¹

ALSA is also directly beneficial to the students of Loyola. We, as individual members, automatically receive a copy of the Student Lawyer Journal which is published seven times during the school year. This informative publication contains interesting as well as informative articles and advise from leading members of the bar. ALSA also publishes pertinent articles dealing with various aspects of the profession and these are available in pamphlet form free to individual members. Such articles as "Two Tips On Writing Law Exams", "Practical Answers on the First Years of Law Practice", "Today's Bar Exam" and "The Government Lawyer and The Law Clerk" are just a few of the many pamphlets available. Additionally, a low cost life insurance is offered to members through

1. A.L.S.A. Const. art. I, § 2.

(Continued on page 31)

FRATERNITY ROW

PHI DELTA PHI

Phi Delta Phi offers the Loyola Law Student an opportunity to participate in extra-curricular activities as partial preparation for assuming the responsibilities of the legal profession. One might ask, "professional preparation is fine, but what is a legal fraternity going to do for me *right now*?" The members of Phi Delta Phi, like all law students, realize the importance of guiding beginning students in writing law exams. One of the prime factors for failure from Law School is the inability of students to write law examinations. This is the reason why Phi Delta Phi upper classmen, who have reached a high level of academic achievement, conduct seminar groups with Phi Delta Phi pledges. The purpose of these small informal seminars is to assist the beginning student in the *art* and *skill* of writing law examinations.

Phi Delta Phis unselfishly give their service to the Law School. Members of the fraternity are active in student government, legal writing programs, teaching fellowships, legal periodicals and many other activities. In addition to this individual participation Phi Delta Phi operates a Book Exchange at moderate prices for the benefit of Loyola students.

Outstanding members of the legal profession will be invited to luncheons sponsored by Phi Delta Phi. This personal contact with practicing attorneys, judges, and leading legal authorities is a vital function of a legal fraternity.

The social advantages to a legal fraternity are certainly important. Social activities such as cocktail parties, athletic events, and exchanges with local college sororities are vigorously supported. However, these activities do not dominate the Phi Delta Phi calendar. The members of the fraternity realize social activities ought to be secondary to academic achievement.

It is the goal of Phi Delta Phi, through professional and social activities, to supplement a law student's education to prepare him for professional responsibility, initiative, and service to profession and community.

PHI ALPHA DELTA

Like the explosion of a Roman candle on the 4th of July, Phi Alpha Delta Legal Fraternity is once again bursting forth with a stellar program for the coming academic year. An outstanding schedule of social and professional activities is programmed to surpass even last year's highly successful events.

Following the recognized objective that a legal fraternity serves to aid the neophyte lawyer in preparation of becoming a dignified member of a highly professional field, P.A.D. presents a five-star formula to its members in furtherance of this goal. The first star represents P.A.D.'s renowned academic program; the second star shines just as brightly in the socialability area; the third star ties the first two stars together by bringing a social approach to events hinged on absorbing practical legal knowledge; the fourth star stands for the life-blood of any fraternity its rush program to gain new members; the last star, but certainly not the dimest, is that of activities in both school and community.

Members of Phi Alpha Delta are proud of these goals, and justly so. They know that when they graduate from law school they have gained more than a mere "textbook" approach to the legal profession. They have gained invaluable experience in the acceptance of responsibility in the community, and in turn, to command the respect and dignity that every attorney must learn to earn from his fellow man.

Phi Alpha Delta offers what is perhaps one of the most successful seminar programs in the country for its freshman pledges. Actives are selected who have excelled in each freshman course. They hold a week-end concave where they present a hypothetical exam question for each course, correct what they feel is in error and attempt to give some insight to the freshman of what Finals are like at Loyola Law School. P.A.D. doesn't attempt to give the student the correct "canned" answer to any course, but only to give some advance practice and aid on handling law exams.

Also, as incentive for the upperclassmen,

two scholastic awards are given annually by Phi Alpha Delta. The national office gives a plaque in honor of the highest accumulative average obtained by a graduating P.A.D. member. The local chapter annually awards a set of California codes to the freshman member with the highest average for his first year in law school.

Following the precedent set by last year's members, Phi Alpha Delta has come through with a schedule of social events geared to meet the individual desires of the entire membership. The annual affairs include a welcome cocktail party, poker-beer bust, initiation party, tri-chapter Christmas dance with P.A.D. chapters at U.S.C. and U.C.L.A. and the activation dinner in the Spring.

Added to these annual events are a Halloween party, theatre venture, New Year's Eve party, alumni-active stag party and to round out the year, a Spring-formal.

It is in this area that members obtain some of the most informative legal hints and knowledge that may be gained outside of the classroom. The format includes an afternoon luncheon series with guest speakers, tours through the Los Angeles Court system, and get-togethers with alumni of the fraternity.

Last year's luncheon series concluded with a highly successful affair at the Playboy Club, and this year's program may prove to be even more enjoyable. The theme is centered around the practical questions of what field of law and what type of firm should a beginning attorney engage in.

The Court Day Program serves as an introduction to the many different departments of the Los Angeles County Court System. Members are taken from the basic filing departments, through Law & Motion, actual court trial and even the morgue.

Highlight of the year is the annual P.A.D. Judge's Night, an affair sponsored by alumni of the fraternity. Here is an excellent chance for members to meet with practicing attorneys and judges of this area.

Phi Alpha Delta is the largest legal fraternity at Loyola. It gained this honor by an open rush program, whereby any and all male students, who are inclined to do so, may join. Combine this open invitation with the varied program that P.A.D. offers to its

members, and it is easy to see why 65 students were pledged in 1964 alone.

1965 brings hopes of even a larger pledge class, for the enthusiasm of the freshmen class in *ALL* aspects of legal training is quite evident. P.A.D. is looking forward to seeing many of these persons as members in the near future.

Members of Phi Alpha Delta realize that their obligation as a future part of the legal profession does not end with the mere joining of a legal fraternity. They should take part in other activities as well. This is demonstrated aptly by looking to some student positions held by P.A.D.'s at Loyola. From class representatives to co-editor of the Digest and President of the Board of Bar Governors, there is found a P.A.D. The same applies to the Honor Roll, Teaching-Fellows and other positions at school.

PHI DELTA DELTA

WOMEN LAW STUDENTS

During the Summer of 1965, the Women Law Students of Loyola Law School reactivated the Alpha Theta Chapter of Phi Delta Delta Sorority for purposes of:

Permitting a close association of the women on campus in both day and evening divisions, and

Providing activities designed to acquaint the women more fully with the practice of law through informal discussions with prominent women in various fields of legal practice.

The first event of the advent of the school year will be a "Get Acquainted Pot Luck Dinner" on October 3, 1965. Thereafter a series of three informal dinner discussions are planned for November, January, and March, with such outstanding women as Judge Mildred L. Lillie.

The members of Phi Delta Delta wish to extend a warm welcome to all the women law students to join in the activities planned. Notice as to dates and time will be posted.

We wish all of the first year students the best of luck in their studies in this academic year.

THOMAS MORE LAW SOCIETY

TMLS has been called the "Papist Underground" of Loyola by some, especially if someone by chance calls it the *Saint Thomas More Law Society*. To those who hold this opinion of the Society, this article may seem a subterfuge. Actually TMLS is an association which interests itself in the examination of the human implications of the study and practice of the law.

Students in the third and fourth year will remember TMLS as the sponsor of periodic luncheon-lectures. Newer students will have far less acquaintance with TMLS. The history of the Society, while an important tradition, is not as important as its present plans and organization.

Formally the membership of TMLS is student body wide. Practical necessity, in view of the objectives of the organization, precludes

holding a meeting at which all members are present. Accordingly the destiny of the organization is directed by a steering committee of limited membership.

This committee chooses subjects of interest for its purposes, arranges to have an authority on the subject meet with the Society, prepares a file of background materials, and invites interested students to attend the discussion.

TMLS is committed to a theory of participation and contribution. It is committed to a seminar or symposium, as opposed to a lecture approach. Those who attend these meetings are expected not only to absorb, but to produce helpful ideas.

This year's TMLS program will commence with a discussion of proposed laws liberalizing permissible causes of abortion.



"GET IN THERE, WE'LL SUE FOR MILLIONS!"

INSANITY AND THE CRIMINAL OFFENDER

By Larry de Coster

I. Mental Presence

The California State Constitution provides that the accused shall have the right to appear and defend a charge against him in person and with his counsel.¹ Also, it is provided by statute that a person cannot be tried, sentenced or punished while he is insane.² This has been interpreted by the courts to mean that the defendant cannot be proceeded against if he is not capable of understanding the nature of the proceedings.³

Defense counsel can raise this issue at any time in the criminal proceedings by oral or written motion to the court. The issue is seldom raised prior to trial. When raised at trial, the court has discretion as to whether or not to suspend proceedings. That is, the court must have a "doubt" as to the defendant's mental state. Whether or not that doubt exists is within the court's exercise of sound discretion. It is helpful if the defense's motion is accompanied by psychiatrists' affidavits. If the affidavits raise a doubt, the trial court must order a hearing.

The issue of mental presence is not entirely clarified. It would apply if the defendant did not understand the nature and purpose of the proceedings or could not cooperate with his counsel and thereby hinder his defense. Governor Brown's Commission has recommended that the rule be codified.⁴ It recommends that if the court has a doubt about the "defendant's competency to be proceeded against,"⁵ then it should suspend all proceedings and order a hearing as to the defendant's competency.

If the court orders a hearing, then a jury trial is held to determine the defendant's mental presence.⁶ The defense attorney can put on psychiatric witnesses and the court may appoint three psychiatrists to examine the defendant.

The exact test involved here must be kept in mind by defense counsel. The question is, is the defendant unable to understand the nature of the proceedings or is he unable to cooperate with his counsel in the preparation of the case. The defendant's mental state at the time of the commission of the crime is

irrelevant to this question. The psychiatrist should be made aware of the test involved and carefully briefed on it.

If the defendant is found to lack present sanity, he will be committed to a state hospital until recovery and a trial will be held upon that recovery.⁷ The length of commitment will be determined by the superintendent in charge of the hospital.⁸ However, a writ of habeas corpus is available if defense counsel thinks that further commitment is not called for, in which event another hearing is held.

The main danger here is that the defendant may be committed for a period of time greater than he would receive if found guilty. Therefore, the defense should carefully consider the use of this procedure and then use it only when the need is clearly apparent.

II. DIMINISHED RESPONSIBILITY

As previously noted, upon a plea of not guilty, the defendant is tried upon the issue of guilt. Evidence as to insanity is not admissible at this trial as it is not in issue.

This rule, inadmissibility of evidence as to insanity, has been altered by the California Supreme Court in two cases: *People v. Wells*⁹ and *People v. Gorshen*.¹⁰

In *People v. Wells*, the defendant was charged with assault upon a prison guard. He entered a double plea. On the trial on the issue of guilt, he sought to introduce evidence of physicians who had observed objective manifestations by the defendant. From these manifestations, it could be inferred that, because he was suffering from an abnormal physical and mental condition not amounting to insanity at the time he injured the guard, he acted not with malice aforethought but under fear for his personal safety and in the honest belief that he was defending himself from attack by prison officers. The evidence was not offered to prove self-defense but was offered solely in relation to the specific mental state which was put in issue by the charge and a not guilty plea. The trial court refused to allow the evidence and the defendant appealed to the California Supreme Court. The Supreme Court reversed and said

that while the code precludes testimony on the insanity issue presented on the trial of the issue of guilt, such legislation cannot be construed as permitting the

... prosecution to adduce evidence to prove a specific mental state essential to the crime and at the same time precluding the defendant from adducing otherwise competent and material evidence to disprove such particular mental state, short of evidence of legal insanity,..."

In *People v. Gorshen*, the defendant, a longshoreman working the night shift, had shot and killed his foreman following a fight that arose when the defendant was sent home from work for drinking on the job. The defendant introduced psychiatric testimony tending to show that he had delusions concerning his sexual capacity; that he had come to regard his ability as a worker as proof of his sexual capacity; and that the foreman's treating him as unfit for work amounted in his mind to treating him as a sexual pervert. The evidence tended to show that this threatened Gorshen's whole personality balance and that in this condition he was unable to premeditate and deliberate, a state of mind required for the first degree murder charge against him. He was convicted of second degree murder. The Supreme Court held that the evidence was properly received, and said:

Such expert evidence, like evidence of unconsciousness resulting from voluntary intoxication, is received not as a "complete defense" negating capacity to commit any crime but as a "partial defense" negating specific mental state essential to a particular crime. . . . The inquiry to be made is whether the crime which the defendant is accused of having committed **has in point of fact been committed**, and for this purpose whatever will fairly and legitimately lead to the discovery of the mental condition and status of the accused at the time, may be given in evidence to the jury, and may be considered by them in determining whether the defendant was **in fact** guilty of the crime charged against him.¹²

The rule enunciated by the California Supreme Court does not imply that the defendant may show that he is mentally ill in a limited way. It means that because of his mental state at the time of the commission

of the crime, he is not fully accountable and can therefore only be found guilty of a lesser offense. It is not a complete negation of guilt. If the defendant is charged with assault with intent to kill and he shows that he lacked the specific intent to kill, he will then be guilty of assault with a deadly weapon. As the Supreme Court noted in the *Gorshen* case, diminished responsibility operates in much the same way as the defense of intoxication; it reduces the charge but does not negate guilt of any crime. The jury instruction on this issue is:

You are reminded that a person might be legally sane, as we define that term in dealing with the question of criminal responsibility, and yet be in an abnormal mental or nervous condition; and because of such condition he might be less likely or unable to have or to hold a specific intent or a certain state of mind, which is an essential ingredient of a certain crime. We have received evidence bearing on the mental and nervous condition of the defendant at the time of the alleged commission of the crime charged. Such evidence may be considered by you in determining whether or not defendant did any act charged against him and, if so, whether or not, at that time, there existed in him the specific mental factor and intent which must accompany that act to constitute a certain crime or degree of crime. You do not have before you any issue as to defendant's legal sanity.¹³

What happens is that to the traditional doctrine of *mens rea* is added a "more realistic and scientific appraisal of pathological behavior than currently obtains."¹⁴

This calls for a re-examination of the doctrine of *mens rea*. Concepts such as malice aforethought, purpose, design, intent to kill, etc. are broadened.

Each of these archaic phrases arose out of attempts by the law to judge the psychology of the doer as well as condemn the criminal deed. It should be possible through collaborative effort of both the law and the behavioral sciences, especially psychiatry, to redefine and reinterpret these ancient phrases to make modern psychological and social sense.¹⁵

This rule of diminished responsibility has not yet been fully developed. It appears as though more and more defense attorneys are

using it as a matter of course. This creates distrust among prosecutors and they treat it as "a maneuver to evade punishment."¹⁶ Too many psychiatrists are using it as a vehicle to get across their ideas that every criminal is mentally sick and should not be punished. This atmosphere creates little opportunity for a solid development and valid exploitation of the rule.

It should be emphasized that the "diminished responsibility" rule is never a total defense. For example, if the defendant is found guilty of homicide, the jury, or the court if a jury is waived, must find the degree of the crime of which the defendant is guilty.¹⁷

Governor Brown's Commission has recommended codification of the rule and would impose procedural limits on its use.¹⁸ It recommends that if expert testimony is to be introduced by the defense, notice should be given. Also, if the jury finds that the defendant lacked the specific intent due to the application of the rule, it should return a separate verdict to that effect.

It should be noted that if the charge is reduced because the jury finds that the defendant lacked the requisite intent, the defendant is not committed to a mental institution. He is sentenced on the lesser offense and after serving that sentence is let loose among society. Therefore, the Commission recommends that upon a separate verdict by the jury on diminished responsibility, the defendant should be committed and not released until it is determined that he is not a danger to society.

Diminished responsibility gives the attorney a lot of leeway in the use of psychiatric evidence. It also gives the psychiatrist more freedom in forming his opinions and expressing them on the witness stand.

III. THE McNAGHTEN RULE

In *People v. Wolff*, the California Supreme Court reaffirmed the McNaghten rule. It stated that the rule is that of *California Jury Instructions — Criminal*, #801 (revised), which reads:

Insanity, as the word is used in these instructions, means a diseased or deranged condition of the mind which renders a person

incapable of knowing or understanding the nature and quality of his act, or unable to distinguish right from wrong in relation to that act.

The test of sanity is this: First, did the defendant have sufficient mental capacity to know and understand that it was wrong and a violation of the right of another? To be sane and thus responsible to the law for the act committed, the defendant must be able both to know and understand the nature and quality of his act and to distinguish between right and wrong at the time of the commission of the offense.

The court went on to say that "the McNaghten test has become an integral part of the legislative scheme for the appraisal of criminal responsibility in California and any change therein should come from the legislature."¹⁹

As already seen, this is a restrictive rule as to the extent and the use of psychiatric evidence. The psychiatrist does not really testify as a psychiatrist. He has a difficult time coping with the rule.

Each expert must justify his own use of it. Many of the differences apparent in the "battle of the experts" revolve about the meaning of the word "know" in the McNaghten formula. If interpreted very strictly, then almost every defendant, no matter how mentally ill, **knows** that what he did was wrong. Under a strict definition, the only persons who are so mentally ill that they do not **know** this are a few far-deteriorated . . . and far-advanced psychotics (who) are hardly capable of acting on aggressive impulses even if they existed.

If, however, "know" is interpreted to mean "comprehend," to know right and wrong in terms of their social, moral, and emotional ramifications then, indeed, few defendants would be sane and responsible.²⁰

D-O psychiatrists are apt to give a strict interpretation to the McNaghten rule and analytic-psychologic psychiatrists tend to be very broad in their interpretation.

As a result of these difficulties, the "not guilty by reason of insanity" plea is seldom used and then only in capital offense cases where highly competent attorneys are involved.

Governor Brown's Commission has recommended that the rule be substituted with:

A person is not criminally responsible for an act, if, at the time of the commission of the act, as a substantial consequence of mental disorder, he did not have adequate capacity to conform his conduct to the requirements of the law he is alleged to have violated.²¹

The Commission explains the rule in a very careful analysis of the terminology used:²²

"Not criminally responsible" eliminates the label of criminal from a defendant falling within the test.

"At the time of the commission of the act" points out that the test applies to the time of the crime rather than to the mental state of the defendant at some other time.

"A substantial consequence" points out that the mental disorder must be the primary factor leading to lack of responsibility. "Consequences" is thought by the Commission to be a more meaningful tag than "product," as used in the Durham rule, or "result" or "offspring." A causal relation must exist between the mental state of the defendant and his conduct and that relation must be a significant one. "Sustantial" is also used in order to eliminate minor mental disorders from consideration.

"He did not have adequate capacity to conform" points to responsibility, to the question of whether or not the defendant was capable of conforming his conduct to the requirements of the law.

"Law he is alleged to have violated" is designed to create a connection with the specific crime for which the defendant is charged. This would eliminate a general consideration of the defendant's mental state, it would divert attention from the personal moral standards of the defendant.

Lastly, "mental disorder" is defined as any "mental disease, defect, or other condition." The Commission states that:

... in our opinion, in view of our present limited knowledge, it would be unwise and improper to attempt, by statute or by judicial decision, to define precisely that which is a question of fact—mental disorder. This becomes even clearer when it is emphasized that, in the last analysis, **it is not the description of the defendant's mental condition**

which is controlling: The crucial issue is the effect that this mental condition has on the defendant's capacity to control his conduct.²³

The Commission's test is presently being studied by the Senate Interim Committee on the Judiciary and by the Assembly Interim Committee on Criminal Procedure. These committees received the recommendation in 1963, and there has been favorable comment on it in the Assembly Committee.

If the Commission's rule is adopted, it is certain that the area of availability of insanity as a defense will be greatly broadened. Whether or not it will be utilized remains to be seen. It might well be that it is a great ado about nothing when it appears that the diminished responsibility rule is here to stay. The Commission's test has only one advantage over the diminished responsibility rule, it is a total defense. On the other hand, it has a disadvantage. A finding of insanity results in commitment in a mental institution, while a finding of diminished responsibility results in a lesser sentence in a penal institution. It might well be that the Commission's recommendation will be used only in the same type of cases as the McNaghten rule is used, capital offense cases.

FOOT NOTES

1. Calif. Constitution Act 1 § 13.
2. Cal. Penal Code § 1367.
3. *People v. Berling*, 115 Cal. App. 2d 255, 251 P. 2d 1017 (1953).
4. *Second Report*, 40.
5. *Ibid.*
6. Cal. Penal Code § 1368.
7. Cal. Penal Code § 1370, 1372.
8. Cal. Penal Code § 1372.
9. 33 Cal. 2d 330, 202 P. 2d 53 (1949).
10. 51 Cal. 2d 716, 336 P. 2d 492 (1959).
11. 33 Cal. 2d 330, 346.
12. 51 Cal. 2d 716, 727-728.
13. Calif. Jury Instructions—Criminal.
14. C.E.B., 623.
15. C.E.B., 624.
16. Cal. Penal Code § 1157.
17. Leavy, *Psychiatry and Criminal Law: The Lawyer's Role*, 39 Los Angeles B. Bull. 113 (1964). (Hereinafter cited as Leavy).
18. *Second Report*, 16-17.
19. 61 Cal. 2d 795, 803.
20. C.E.B., 621-622.
21. *First Report*, 48.
22. *First Report*, 48-51.
23. *First Report*, 50.

MOOT COURT COMPETITION

by *Dennis Merenbach*

The regional rounds for the National Moot Court Competition will take place on November 16th and 17th, 1965, at the Los Angeles County Court House, 111 N. Spring Street. Loyola Law School will be represented by Patrick Lynch, Lola McAlphine, and Dennis Merenbach.

Each school that participates in the competition receives an identical transcript of the Moot Court problem. This year the two basic issues are in the areas of Constitutional Law and Conflicts of Law.

The plaintiff in the case is Penelope H. Iffington, a citizen of the State of Blackacre, who is represented by P. Y. Maison. The defendant is Floyds of Whiteacre, an insurance company having its principal place of business in the State of Whiteacre. Jack Riskovitch is President of Floyds of Whiteacre, and retained the firm of Hound and Hardhart to defend the corporation.

The defendant issued a personal liability policy to Gertrude Gonzales, the roommate of Penelope Iffington. This policy was personally delivered to Miss Gonzalez in the State of Blackacre by Jack Riskovitch. Floyds of Whiteacre is an unauthorized foreign insurer within the meaning of the Blackacre Insurance Code.

The plaintiff and Miss Gonzalez planned a vacation to the State of Caribbeana. Within one hour of their arrival in Caribbeana, it is alleged that Miss Gonzalez negligently caused the contents of her pocketbook to be spilled, as a result of which a pen-size tear gas gun contained therein was discharged which injured the plaintiff.

There is a statute in Caribbeana that allows an injured party, at his option, to bring

legal action directly against the insurer of the policy holder responsible for that injury. There is no statute in Blackacre and under Blackacre law an injured party can not sue the alleged wrongdoer's insurer until a judgment has been obtained against the wrongdoer and remains unsatisfied for more than thirty days.

The plaintiff filed suit in the United States District Court, District of Blackacre. The action was instituted pursuant to the direct action statute of Caribbeana. The complaint made reference to diversity of citizenship and a controversy exceeding the sum of \$10,000.00 (exclusive of interests and costs), and allegations necessary for a negligence cause of action.

The defendant's reply was a motion pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure dismissing the complaint for lack of jurisdiction on the ground that the direct action state of Caribbeana did not apply.

Subsequently, the plaintiff filed a motion for an order pursuant to the Blackmore Insurance Code. This code requires a defendant to deposit or file with the Clerk of the Court, cash or securities or the bond of a surety to equal the alleged damages, or procure a license to do an insurance business in the State of Blackacre. The code further provides that an unauthorized foreign insurer cannot file any pleading until this condition is met.

The District Court considered both motions and ruled in favor of the defendant's motion and held the Blackacre Insurance statute unconstitutional. The plaintiff appealed this decision on the basis that the court erred on both motions.

The conflicts of law issue presented by the defendant's motion required the court to apply either the law of the state where the



KENNEDY MOOT COURT ROOM

Loyola to take part in regional rounds for the National Moot Court Competition which will take place November 16-17, 1965 at the Los Angeles County Court House.

injury occurred (Carribbeana), or the law of the state of the forum (Blackacre). As Blackacre had not yet developed a conflict of law rule for this issue, the District Court decided to apply the "grouping of contacts" tests adopted by the State of New York in *BABCOCK v. JACKSON*, 12 N.Y. 2d 473, 191 N.E. 2d 279 (N.Y. 1963). The traditional rule that the place of the injury designates the law to be applied was rejected. If the Court of Appeals sustains the application of the *BABCOCK* test, then the issue will be whether the test of weighing each state's interest was applied correctly.

The motion of the plaintiff was denied by the District Court on grounds that the Black-

acre Insurance State was unconstitutional. The court was persuaded by the financial inability of the defendant to post the required security or to obtain a license to do an insurance business in Blackacre. The financial inability of the defendant would result in a default if the plaintiff's motion was granted. See *DEZELL v. E. E. BLACK, LTD.*, 191 F. Supp. 635 (D. Guam 1961).

The Loyola Moot Court Team will submit a brief on behalf of the appellant, Penelope H. Iffington. However, the team must be prepared to argue in favor of either appellant or respondent. The side to be argued is disclosed to the team a few minutes before the arguments begin.

AN OPTIONAL TAX FABLE

by *Clemente Smith* and *Donald W. Cowen**

Professors of Law, Loyola Law School

Once upon an April 15 there were two young income taxpayers named Taxwise and Otherwise. They lived side by side in the tabulated land of the District Director of the Internal Revenue Service. Fortune, in the form of Form 1040, smiled on Taxwise. Fortune, in the form of Form 1040, frowned on Otherwise.

Taxwise dwelt in a modest cottage with his unemployed wife and his dependent mother. His wife bore him a son on December 31 of the first year of their marriage. Taxwise could take an exemption for his son for that year. Otherwise dwelt in a modest cottage with his unemployed wife and his dependent sister. His wife bore him a son on the day after December 31 of the first year of their marriage. Otherwise could not take an exemption for his son for that year.

Taxwise was self-employed and earned \$4,600 in one year. He spent \$101 that year for the tools of his trade. His income tax, with his four exemptions, came to \$238. Otherwise was an employee and earned \$4,500 in the same year. He spent \$101 that year for the tools of his trade. His income tax, with his four exemptions, came to \$247.

Taxwise, in a single year, made an invention and sold the patent for a \$1,000 gain. This transaction added \$500 to his taxable income. Otherwise, in the same year, wrote a story and sold the copyright for a \$1,000 gain. This transaction added \$1,000 to his taxable income.

Taxwise sold his modest cottage at a profit. He spent the money for another cottage into which he and his family moved one day before a year had passed. The profit that Taxwise made on this sale was not a taxable gain. Otherwise sold his modest cottage at a profit. He spent the money for another cottage into which he and his family moved one day after a year had passed. The profit that Otherwise made on this sale was a taxable gain.

It befell that Mrs. Taxwise divorced Taxwise, and the court gave her the custody of their minor son. In accordance with their agreement, Taxwise paid Mrs. Taxwise \$50 a month for support, to be reduced to \$25 a month when their son reached 21. Taxwise was allowed a tax deduction of \$50 a month. It befell that Mrs. Otherwise divorced Otherwise, and the court gave her the custody of their minor son. In accordance with their agreement, Otherwise paid Mrs. Otherwise \$25 a month for support and \$25 a month for support of their son until he reached 21. Otherwise was allowed a tax deduction of \$25 a month.

After divorce, Taxwise continued to live with his mother and pay for more than half of her support. In one year his mother earned \$599. Taxwise could take an exemption for his mother that year. After divorce Otherwise continued to live with his sister and pay for more than half of her support. In one year his sister earned \$600. Otherwise could not take an exemption for his sister that year.

The mother of Taxwise became ill and unable to work at 65. Her \$50 doctor's bill was deductible by Taxwise. The sister of Otherwise became ill and unable to work at 65. Her \$50 doctor's bill was not deductible by Otherwise.

The dependent mother of Taxwise qualified him to use a lower tax rate schedule as Head of Household. This continued to be true even after they quarreled and Taxwise moved his mother into separate housing. The dependent sister of Otherwise qualified him to use a lower tax rate schedule as a Head of Household. This ceased to be true after they quarreled and Otherwise moved his sister into separate housing.

O Tax, Where Is Thy Certainty?

Once upon an April 15 there were two old income taxpayers. They died side by side in the tabulated land of the district Director. Only one thing is certain in this world, my children. It's not taxes. [The End]

*Reprint from THE TAX MAGAZINE, May 1965

THE MAN FROM U.N.C.L.E.

by Janet Chubb

Agent 007 peered cautiously into the dusty volume. Could this be the tome that contained the information necessary to crack his case? As an agent (See *Corpus Juris Secundum* on principal-agent relation) for the leading research organization in the country, it was his responsibility to see that not detail or possibility was left unexamined as he searched for his objective—a case in point. In fact, this was the most important aspect of his job, for failure would mean a victory for F.E.R.N.E., (factors eventually revealing non efficiency) his opponent in this litigation. He could see her now, extremely attractive with her flowing blonde hair and subtle green suit, as she systematically leafed through the volumes of law. Opposition of this nature generally presented no problem to 007, but when it involved points of law, Ferne was as deadly with a Shepard's as any of his less appealing opponents.

James Bond (see *A.L.R. 2d* under stock or share), for 007 was merely a code (see *United States* or *California Civil*), evaluated the possibilities which lay open to him in the area of combat preparation called the law library. Having already determined the legal issues, Bond was ready to begin his search for law that would establish and verify his contentions. The possibilities open to him seemed endless, but stamina was one trait necessarily found in the detectives of his organization, U.N.C.L.E., (the United Network command for Legal efficiency).

The only clue he had was the last word which the "74.9" man had uttered, "survival." He glanced at the reference works paneling the walls, picked up the *Permanent Edition, Words & Phrases*, edited by West Publishing Company, and thumbed through to the word "survive." He found a quantity of valuable information, including definitions, fields where the term might be applicable, and cross references, in addition to specific cases where this subject might be relevant.

Having evaluated these possibilities and taken down the important cases, he turned

next to the encyclopedias, *Corpus Juris* and *Corpus Juris Secundum*, whose coverage included the entire body of American law, and to *American Jurisprudence* and *American Jurisprudence 2d*, whose volumes contained especially helpful footnotes. He then scanned the local encyclopedias in an attempt to avoid overlooking even the smallest clue.

Bond next sought out the legal periodicals for possible authority in the field, including foreign articles as well as domestic. The information available was easily located as nearly all the articles were listed both by subject and author in the *Index to Legal Periodicals*.

After noting Ferne's progress as she, pursued her extensive research, he proceeded to investigate two primary digests, *McKinney's New California Digest* and *West's California Digest*, checking subject matter and picking out relevant case citations as he pursued this material. He then sought help from *A.L.R.* and *A.L.R. 2d*, acknowledged to be the most comprehensive and compact restatements of American Law.

Collecting the case references he had sorted out of the encyclopedias, digest, he located each case in the reports, noting parallel citations in the unofficial reports for later use in his brief.

He appreciated the fact that the National Reporter System was keyed to the American Digest System as this enabled him to go directly from his references in the *Decennials* to the cases he anticipated would be relevant. He carefully checked local, state and federal sources as his jurisdiction was unlimited.

Having exhausted the realms of research, Bond & Ferne each felt his side might win. Victory or defeat hung in the balance of a decision soon to be handed down by the Appellate Court. Bond and Ferne both waited anxiously outside a drab, gray building, squeezed into a shadowy valley in San Francisco. Out of this publishing house would soon come the latest advance sheet with the decision for which each of the two expert researchers waited.

(Continued on page 31)

BOARD OF BAR GOVERNORS

by Ronald M. Cohen

The first year freshman class was introduced to the law school at an evening *orientation program* presented by the Board of Bar Governors. The session which commenced with an introductory talk by Dean J. Rex Dibble



years in the hopes that the incoming classes will be easier able to adapt to the demands of law school and that there will be a marked decrease in the attrition rate.

The *senior placement brochure* is in the process of publication and should be in distribution by the fourth week in October. The brochure is a pamphlet published by the senior graduating class and contains pictures and resumes of all graduates along with awards achieved and work experiences. The brochure is sent to all prospective employers and legal agencies, introducing the class of 1966 to the legal community. The benefits of this program in the past years have been invaluable and has been a model for similar efforts undertaken in many schools throughout the country.

The American Law Students Association convention was held in Miami, Florida August 7-12 and was attended by Burleigh Brewer, second year day class representative, and myself. The convention is a gathering of delegates representing the associated membership of some 7500 law students of all the accredited schools throughout the country. The convention provided prominent speakers on the subjects of Forensic Pathology, anti-Trust in the baseball world, and trial practices and

techniques. There were numerous opportunities for workshop discussions in which problems common to all law schools were commented on and solutions shared amongst delegates from different geographical areas. Loyola's representatives took an active part in all the meetings and provided examples for other starting schools to utilize and constructive suggestions for the larger schools, benefiting them from our experiences. Burleigh Brewer was elected chairman of the Audio Visual committee and is in charge of collecting, publishing and disseminating films and literature of legal interest to the nations schools. This initial introduction into the national organization will pave the way for future responsibilities in leading the efforts of the ALSA to achieve its potential of 55,000 membership, representing every law student in America.

The foremost project under the auspices of the Board of Bar Governor's is the revamping of the legal publication, Loyola Law School's Legal Digest. This beginning innovation, changing the format from that of a throw away paper into a professional handbook, is of major importance in establishing Loyola into a leader on the local and national scene. The digest is dedicated to presenting educational and informative materials to the lawyer and law school. Under the Co-editorship of Roger Franklin and Joseph Di Loretto, the Digest has been re-born into a substantial review of general information on the changes and revisions of selected topics of interest. The alumni of Loyola will find Blackstone's Commentaries will keep them up to date as to the goings on and whereabouts of long lost classmates. The student will find fraternal and organization information as well as forthcoming plans and programs concerning the law school. We hope that this new presentation will become an important asset to the student and practitioner; it is our contribution to the ever important need for continuing education.

The coming months will see an increased noon lecture series, a second and expanded issue of the Legal Digest, a Spring dance to

(Continued on page 31)

LOYOLA DIGEST

THE CASE AGAINST PROSECUTION DISCOVERY

By Norman Montrose

In Jones Superior Court, the petitioner had been charged with rape. On the day set for trial, he was successful in gaining a continuance on the ground that he needed further time to collect medical evidence pertaining to his alleged impotency which was result of injuries he had allegedly sustained several years prior thereto. Within a week, the prosecution filed a motion to discover the names of all physicians the defendant intended to call as witnesses in reference to his alleged impotency, the names of any physicians who had treated the defendant for his purported injury inflicted impotency and finally all reports and x-rays ever taken in connection with this injury. The trial court granted this motion over objection. The petitioner in his effort to restrain the order through a writ of prohibition asserted that the discovery order violated the privilege against self-incrimination guaranteed by the California Constitution.¹

Relying heavily on the fact that the alibi statutes (statutes which require a defendant to plead the defense of alibi or insanity and to disclose in advance of trial the names of witnesses he will call as to these defenses) found in some 14 states had been consistently upheld as non-violative of the local privilege against self-incrimination, a divided court ruled the prosecution is entitled to discover the names of witnesses the defendant intends to call and all materials he intends to introduce into evidence. However, the court granted the writ of prohibition since the discovery order went beyond the permissible limits.

The question now becomes what is the meaning and extent of this decision? Unfortunately, there has been no appellate decision directly involving the issue in Jones in the almost three years since the latter has been handed down.² A recent article by Chief Justice Traynor (who wrote the majority opinion in Jones) which discusses this decision adds no illumination to what is contained within the case itself.³

According to Jones, the prosecution may then discover the names of the witnesses the

defense "intends to call" and all materials the defense "intends to introduce in evidence." Well then, how does the prosecution learn what witnesses are intended to be called and what is intended to be introduced as evidence? Presumptively the defense could be compelled to disclose this in advance of trial or the Jones decision would have no meaning because a defense attorney would hardly ever openly disclose this and thus submit to discovery without compulsion.

In many if not most instances, due to the brevity of time between his retention and trial, a defense attorney will not know until the time of trial every witness he will call and every stitch of evidence he will seek to introduce into evidence. Therefore, a defense attorney will have only a general idea as to these matters until very shortly before time of trial.

The Jones holding granting the prosecution the right of discovery against a defendant is the first and only decision of its kind.⁴ Up until *Jones V. Superior Court*, it was just tacitly assumed in dicta by the various courts without comment that the defendant's privilege against self-incrimination prevented the prosecution from having the right of discovery.

Representative samples of this assumption is found in the following three cases: In *State V. Rhoades*⁵, it was declared that "The state cannot compel the prisoner at the bar to submit his private papers or memoranda to the state for use or even examination, for he cannot be required to testify in the case, nor to furnish evidence against himself . . ." While in *United States V. Garrison et al.*,⁶ Learned Hand stressed that ". . . Under our criminal procedure the accused has every advantage while the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence . . ." Finally, the recent case of *State V. Tune*⁷ firmly stated that ". . . in view of the defendant's constitutional and statutory protections against self-incrimination, the

state has no right whatsoever to demand an inspection of any of his documents or to take his deposition, or to submit interrogatories to him . . ." Now the dicta from these three cases can hardly be considered as pillars of authority against the ruling found in Jones. Nevertheless, they emphasize the fact that modern judicial thinking has and apparently still considers the right of discovery in the prosecution as definitely violative of the privilege against self-incrimination.

Perhaps more in point, the Jones decision rejected long standing California authority which put the self-incrimination privilege upon the highest legal plateau while stressing that the privilege could in no way be violated.

In *Ex Parte Cohen*,⁸ one Louis Cohen was called by the prosecution in a criminal action to testify concerning an alleged election fraud. Cohen refused to answer the questions put to him on the ground that by answering them, he would incriminate himself. Cohen's contempt citation was affirmed on the basis of an immunity from prosecution statute. Nevertheless, the court put forth the first succinct delineation regarding California's constitutional safeguard against self-incrimination. In this regard, the court at page 527 declared

" . . . the object of the provision is the immunity of the individual from compulsory self-accusation. 'The provision that a person shall not be compelled in a criminal case to be a witness 'against himself' is to be construed as protecting him from being compelled to give any evidence which in a criminal prosecution against himself **might in any degree tend to establish the offense with which he may be charged . . .**' (emphasis added)

In accord with the adamant position stated in *Ex Parte Cohen* is the fairly recent case of *People V. Talle*⁹ which was cited extensively in the dissent to Jones. This was a prosecution for first degree murder wherein the prosecution called as its first witness the defendant. The defendant's refusal to take the stand during the presentation of the prosecution's case brought numerous comments from the District Attorney. In reversing the conviction, the District Court of Appeal stated that this procedure or method undertaken by the prosecutor violated the defendant's

constitutional and statutory guarantees against self-incrimination. The major reasons for this conclusion were as follows:

"It will be noted that under these constitutional and statutory provisions the right of the defendant to remain silent is absolute. . . . 'Under a proper interpretation of these quoted provisions, an accused has the right to stand mute, clothed in the presumption of innocence, until the prosecution, at the trial has made out a prima facie case against him. Until this has been done it is improper to even comment on his silence.'"

As the Jones Court indicated, there is also California authority to the effect that a defendant need not produce documents in his possession because this would be violative of his privilege against self-incrimination. For example, in *People V. Chapman*,¹⁰ it was fervently asserted that " . . . It is axiomatic that the court cannot compel the defendant in a criminal case to produce any incriminating writing . . ." The majority opinion of Jones goes to great lengths to state that its ruling was neither contrary to the established authority in California nor like authority which prevailed throughout the United States. This conclusion being based on the fact that they would allow prosecution discovery only to the extent that the defendant intended to call or intended to introduce as evidence. However, as was pointed out in reference to the Rex hypothetical, this formula is more apparent than real in preventing self incrimination in the context of discovery by the prosecution. True, there may be instances where the formula for allowing the discovery would work no unjust results. However, in the great majority of cases, there would result little more than a wholesale fishing expedition by the prosecution into the defendant's materials which may be self-incriminating. I suggest that this result is contrary to the great American legal tradition which existed even before the adoption of the United States Constitution in 1789, namely that a defendant in a criminal action need not be a witness against himself.

The Jones decision relied very heavily upon the several decisions in other jurisdictions which held their respective alibi statutes were not in violation of the privilege against self-incrimination. These alibi statutes in general

require the defendant in a criminal prosecution to disclose before trial the particular alibi he is going to rely upon if any plus a detailed factual account which gives rise to the alibi. A few states in addition require the names of supporting witnesses.

The penalties for non-compliance by the defendant are similar in all of the jurisdictions having such a statute in the sense that evidence for such an alibi defense may be excluded at trial in the discretion of the trial judge. However, some states require mandatory exclusion. California refused to pass an alibi statute in 1961.¹¹ Under the present California statutory scheme, except for giving the prosecution notice of the defense of insanity and pleading double jeopardy, a defendant need not provide the prosecution notice of or plead any other defenses he may rely upon.¹² The Jones decision specifically cited the following cases in reference to upholding local alibi statutes which in turn were cited as authority for giving the prosecution the right of discovery in California.

*State V. Thayer*¹³ upheld a trial court exclusion of the testimony of certain witnesses offered by the defendant to establish an alibi, i.e., the defendant could not have been at the scene of the crime when it was committed. The reason for the exclusion being the defendant had not given the prosecution the statutorily required notice of his intention to present an alibi. In considering the purpose behind the alibi statute, the Thayer court remarked at page 657:

"This law pertains to a very important feature of the criminal law. It gives the state some protection against false and fraudulent claims of alibi often presented by the accused so near the close of the trial as to make it quite impossible for the state to ascertain any facts as to the credibility of the witnesses called by the accused who may reside at some point far distant from the place of the trial."

In *State V. Kopacka*,¹⁴ the court here upheld the constitutionality of their states alibi statute and accordingly held notice of one's alibi was not notice of a different alibi one's alibi was not notice of a different alibi produced at trial. The court quoted with favor

the policy rationale as quoted above from *State V. Thayer*.

*People V. Schade*¹⁵ was the first New York case upholding that state's alibi statute on the grounds that the prosecutor's demand for a bill of particulars as to the defendant's alibi did not compel the latter to be a witness against himself but merely to give notice if he intends to submit an alibi. At page 617, the court declared that

"The purpose of the adoption of the alibi statutes in Ohio, Michigan, and this state is obvious. It was designed to prevent the sudden 'popping-up' of witnesses to prove that the accused was not at the scene of the crime at the time of its commission. . . . The bringing into the courtroom of 'phoney alibi' witnesses at the eleventh hour and at a time which, in practice, affords the prosecutor no opportunity to check either the credibility of the witnesses or the accuracy of their statement . . ."

This then is the authority upon which the California Supreme Court made its ultimate determination for allowing discovery by the prosecution in a criminal action.¹⁶ It should be noted that in all these cases, the prosecution was seeking, as the local statutes allowed, the particulars of the defendant's alibi if he intended to use one at trial. In no case did the prosecution seek nor the local statutes allow discovery of a defendant's documents, records, and the like. Sure, these cases held the alibi statutes strictly limited to notification of the particulars of an alibi did not violate the privilege against self-incrimination, but this is not to say that the same would apply to general rights of discovery by the prosecution. In point of fact, the purpose of the alibi statutes as quoted earlier was in no way intended to give the prosecution a right of discovery, but merely to prevent fraudulent eleventh hour alibis at trial by witnesses under the sway or control of the defendant. Therefore, the authority cited by the Jones Court does not provide any foundation upon which its decision could be maintained.

The only other cases in the United States which appear to involve any form of discovery by the prosecution are three Federal District Court decisions, none of which were cited in Jones. These three decisions gave the United States a limited right of discovery against the

defendants on the basis of Rule 17c of the Federal Rules of Criminal Procedure, 18 U.S.C.A.¹⁷ However, neither of these decisions can or could have served as a basis of authority for Jones because on their particular facts the self-incrimination privilege was not directly involved: *United States V. Gross*¹⁸ and *United States V. Woodner*¹⁹ were instances where the prosecution sought inspection of business records required to be maintained by law and thus outside the ambit of the self-incrimination privilege; *United States V. Lilly Co.*²⁰ involved a corporation and hence the privilege again did not apply. To repeat, *Jones V. Superior Court* definitely is the only case within the ambit of United States case authority allowing the prosecution a right of discovery against a defendant where the self-incrimination privilege was directly involved.²¹

It must be remembered that in 1962, the date of the Jones decision the United States Supreme Court was still two years away from ruling upon issues which *Malloy V. Hogan* presented.²² In *Malloy*, the petitioner had been found in contempt by local Superior Court for refusing to answer certain questions. The petitioner had refused to answer "on the grounds it may tend to incriminate me." The application for a writ of habeas corpus was denied by the Supreme Court of Connecticut on the premise "... that the Fifth Amendment's privilege against self-incrimination was not available to a witness in a state proceeding . . ." In reversing the decision of the Connecticut State Courts, the United States Supreme Court held "... that the Fourteenth Amendment guaranteed the petitioner the protection of the Fifth Amendment's privilege against self-incrimination . . ."²³ Furthermore, the federal standards pertaining to self-incrimination are applicable to the states via the Fourteenth Amendment for

"It would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in a state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal or state proceeding is justified."²⁴

Thus, at the time of the Jones decision there existed dual standards as to the extent

of the privilege against self-incrimination. There is no question but that the federal standard was considerably more protective than the California standard. Whether or not the United States Supreme Court would declare prosecution discovery violative of the privilege against self-incrimination is still an open question. However, several recent decisions by the Court indicate the answer can only be answered in the affirmative. These recent decisions are incorporated into the recent California decision of *People V. Dorado*²⁵ where it was declared

"We hold, in the light of recent decisions of the United States Supreme Court, that, once the investigation focused on defendant, **any incriminating statements** given by defendant during interrogation by the investigating officers became inadmissible in the absence of counsel . . .

"... that the constitutional right to counsel **precludes the use of incriminating** statements elicited by the police during an accusatory investigation unless that right is intelligently waive . . ." (emphasis added)

It seems strange that both the United States Supreme Court²⁶ and the California Supreme Court have based the inadmissibility of the incriminating statements upon the denial of the right to counsel as opposed to basing the constitutional violation upon infringement of the privilege against self-incrimination since the decisions stress the investigators (the police) neither informed the defendant of his right to counsel nor his right to remain completely silent. Nevertheless, violation of the privilege against self-incrimination is inherent in the Dorado decision and the two United States Supreme Court decisions, i.e., the incriminating statements because they are incriminating are inadmissible. Thus, the basic inconsistent positions of Jones and Dorado are made apparent and in probable effect Dorado and the two United States Supreme Court decisions have overruled Jones indirectly.

Leaving the self-incrimination area, there is still another basis for attack upon the Jones ruling which was not considered within the framework of the decision. The basis of the attack would evolve around the constitutional guarantee against an unreasonable search and seizure and would follow this line of argument.

In *Boyd V. United States*,²⁷ there was a provision within a customs statute providing for limited criminal discovery by the prosecution. This provision was held to be an unreasonable search and seizure within the meaning of the Fourth Amendment. Hence, the provision calling for discovery against the defendant was unconstitutional.

*Mapp V. Ohio*²⁸ provided that the due process clause of the Fourteenth Amendment prohibited the states from conducting an unreasonable search and seizure and if evidence was so secured, it was inadmissible at trial. The problem then centers around whether the United States Supreme Court will apply the federal standard as to an unreasonable search and seizure or apply a less stringent standard to the states. It must be remembered that the Fourth Amendment provides a specific guarantee whereas the protection against state infringement comes from the very broad confines of the Fourteenth Amendment's due process clause. There was dicta in *Ker V. California*²⁹ that the federal standard applied to the states in regard to the individuals protection against an unreasonable search and seizure. *Malloy V. Hogan*, supra, appears to take it for granted that the *Ker* decision held the federal standard applied to the states. Of course, this pronouncement in *Malloy V. Hogan* was dicta.³⁰ In this regard, it should be repeated and noted that the United States Supreme Court in *Malloy* applied the federal standard as derivative of the Fifth Amendment's specific guarantee against self-incrimination to the states. Therefore, it appears quite likely that the federal standard protecting the right against unreasonable search and seizures will be applied to the states. It appears certain, on the authority of *Boyd V. United States*, that if the federal standard applies to the states, the action ordered by the *Jones* court would be unconstitutional.

In conclusion, it is singularly apparent that the train of modern American judicial thinking has long since rejected such utterances that the privilege against self-incrimination "... is the privilege of crime; the interest of justice would be little promoted by its enlargement ..."³¹ Even the statement of Benjamin Cardozo whose pre-eminence in Ameri-

can jurisprudence goes unquestioned appears outdated in regards to modern legal thought on the privilege: "Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without ... the immunity from compulsory self-incrimination. This too might be lost, and justice still be done ..."³²

In the light of the foregoing discussion, the 1962 decision of *Jones V. Superior Court* appears similarly outdated as well as in direct conflict with the great American legal ideal of social justice for all.

FOOTNOTES

1. Cal. Const. Art. 1 Sec. 13: A criminal defendant shall not "... be compelled, in any criminal case, to be a witness against himself ..."; Penal Code Sec. 1323.5: "... the person accused or charged with the commission of crimes or offenses shall, at his own request, but not otherwise, be deemed a competent witness. "This section shall not be construed as compelling any such person to testify."; Penal Code Sec. 688: "... No person can be compelled, in a criminal action, to be a witness against himself ..."
2. *People v. Lopez* 60 Cal. 2d 223, 32 Cal. Rptr. 424, 384 P. 2d 16
3. Traynor, *Ground Lost and Found in Criminal Discovery* 39 N.Y.L. Rev. 228 (1964)
4. See 96 A.L.R. 2d 1213 (1964)
5. 81 Oh. St. 397, 91 N.E. 186, 192 (1910)
6. 291 F. 646, 649 (S.D. N.Y. 1923)
7. 13 N.J. 203, 98 A. 2d 881, 884 (1953)
8. 104 Cal. 524, 38 Pac. 364 (1894)
9. 111 Cal. App. 2d 650, 667, 245 P. 2d 633 (1952)
10. 55 Cal. App. 192, 198, 203 Pac. 126 (1921)
11. See L.A. Bar Bull. 7, 27 (1961)
12. Insanity: Penal Code Sections 1016, 1017, 1026; Double Jeopardy: Penal Code Sections 1016, 1017.
13. 124 Ohio St. 1, 176 N.E. 656 (1931)
14. 261 Wis. 70, 51 N.W. 2d 495 (1952)
15. 161 Misc. 212, 292 N.Y.S. 612 (1936)
16. The *Jones* decision also cited *People v. Schulenberg* 279 App. Div. 452, 112 N.Y.S. 374, 375 (1952)
17. Rule 17c of the Federal Rules of Criminal Procedure, 18 U.S.C.A.
18. 24 F.R.D. 138 (1959, DC NY)
19. 28 F.R.D. 22 (1961, DC NY)
20. 24 F.R.D. 285 (1959, DC NJ)
21. See 96 A.L.R. 2d 1213 (1964)
22. 12 L. Ed 653 (1964)
23. *Ibid.* p. 656.
24. *Ibid.* p. 661.
25. 61 A.C. 892, 893, 899, 40 Cal. Rptr 264, 394 P. 2d (1964). *Dorado* was affirmed upon rehearing in January of this year although its effect was made non-retroactive. See 62 AC 350, 42 Cal. Rptr. 169 (1965).
26. *Messiah v. United States* 377 U.S. 201 (1964) and *Escobedo v. Illinois* 378 U.S. 478 (1964)
27. 116 U.S. 616, 622 (1885)
28. 364 U.S. 868 (1959)
29. 374 U.S. 23 (1962)
30. 12 L. ed. 2d 653, 661 (1964)
31. *State v. Wentworth* 65 Me. 234, 241 (1875)
32. *Palko v. Connecticut* 302 U.S. 319, 325 (1937)



NEWS FROM THE LAW LIBRARY

by Professor Richard Rank,
Law Librarian

The past year has been a busy one for the Law Library as 16,934 volumes were added to the Library's collection, which now has passed the 65,000 volume mark. The significance of the volume of our last year's acquisition is brought out more vividly by comparison with other libraries. Thus, for example, the Los Angeles County Law Library—a library about ten times the holdings of the Loyola Law Library, and with a full time staff of over forty people—acquired only 14,500 volumes during the same period of time.

Of the new acquisitions, 14,310 volumes were acquired through donations, and 2,624 volumes through purchase. During the year, two special collections were started. One collection is in the field of International Law with special emphasis on the legal aspects of foreign trade and commerce. This collection was set-up with the help of a donation from the Lockheed Aircraft Corporation. The other collection is in the field of Aviation and Space Law and was established with the help of the Douglas Aircraft Corporation. Again this academic year the Lockheed Aircraft Corporation generously has renewed their

grant which will enable us to continue with the build-up of our International Law collection.

During the current year we plan to concentrate on improving our Reference collection. Fortunately, our Law Reports section now is fairly complete, and the Library possesses three complete sets of the National Reporter System. Also our Statutes and Codes section is fairly complete, and in addition the Library possesses all basic sets of English reports and statutes.

This Fall two new members joined the Law Library staff. Mrs. Bertha S. Dorsey is now our Day Circulation and Reference Librarian. She was formerly Law Librarian at the Law Firm of Gibson, Dunn and Crutcher. Our previous Circulation Assistant, Miss Carol Easter resigned this summer to get married. Our Evening Circulation and Reference Librarian is Mr. Norbert Prins, who holds a law degree from the Southwestern University.

This semester we have introduced some new circulation procedures, including a time clock and a fine system hoping that these might improve our services to the students and faculty. The Library has also acquired a Xerox photo duplicating machine, and during the first

(Continued on page 31)

Blackstone's Commentaries

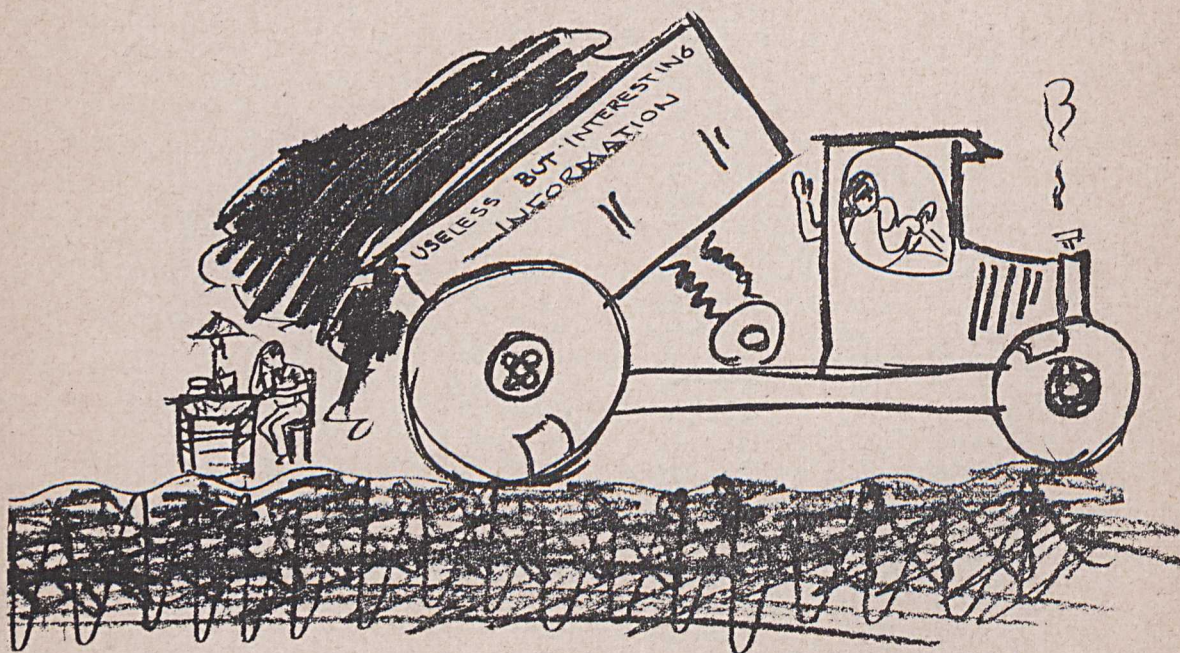
Time is moving at the double, or so it seems, now that the hour borrowed at the fag end of April has to be paid back in kind, come the dying hours of late October . . . They served valiantly, . . . these dependable sixty minutes, . . . the Sovereign State of California provided them by Statute, . . . as they held off daily the shadows lengthening into darkness . . . The nearest answer we have to the poet's plaint, "Backward, turn backward O Time in your flight" . . . Time is money, . . . it pays rich dividends if invested wisely and well . . . the shining hour must be used to the full, . . . for too soon night comes on when no man can work . . . Stepping off the hours with its staccato tread, time halted momentarily only a few days ago to honor Professor Becker, whose more than thirty years of association with the School, almost spans its history, beginning in the Grand Avenue Maison to its present commodious quarters. It was an "Ave et Vale" reunion, rich in memories of the early beginnings of the School and of its operation during the Great War . . . when, at one time among other achievements, it shared honors with Yale, whose fifty-five students, gave it the largest law school enrollment in the country . . . Of course, libations were poured out on the altar of friendship and wreaths were laid at the Shrine of loyalty and devotion . . . for "Jake" as he was called by the legions who were the beneficiaries of his teaching left behind no unfinished business and there were no short-cuts in his treatment of knotty problems . . . The foot-note in fine print and the rule of law in bold black-face type got the same articulate treatment . . . nothing set forth in casebook or text was ever short-changed . . . Everybody got his money's worth . . . In fact, his booming voice was so much a part of him and the School that as soon as you heard it, there was no doubt where you were. This occasion was not without the shock of separation . . . how could it be otherwise, where one had dispensed wisdom and energy for a generation training the lawyer of tomorrow . . . a lot of sentiment has grown up around the spot and the shock of severance, . . . is not without the touch of grim reality . . . We are fortified,

however, in the knowledge that "Jake", the sonorous voice of "Law in Business" . . . will not be too far removed to steal out of retirement, and in the cloistered atmosphere of his office in the Law School, recall the days that were and rejoice that he was no small part in them . . . In the wake of Betsy, . . . the irate femme who lashed to a fury the waters of the Gulf and wrought havoc with its violence-packed hurricanes, . . . **WILLIAM HOWARD ROUNDTREE**, '56 blew into our peaceful Pueblo only a day ago . . . out here for a couple of depositions, he dropped in to report on the ten years since he returned to his native Florida after graduation . . . He admitted that the only two places to live in this world are California and Florida . . . He conceded that he is so entrenched in the practice of law and so occupied in politics, that he is not on the point of changing his domicile from Cocoa, Florida . . . He represents Brevard County in the State Legislature . . . Mayhap the richest source of information on missile development . . . Here Cape Kennedy is located whence Gemini V started the Odyssey of space and made the epic of Homer look like Boys' Week in industry and government . . . **JOSEPH E. MORRIS** '59 and **JOHN YATES**, '59, with courage and determination, started practice together almost before they took off their graduation robes . . . They are at it still and all the evidence would indicate it was a profitable venture . . . They are surely taking seriously the "War on Poverty" program . . . A short time ago they sounded the siren for a reception in the valley where they have a new office . . . It was a quality affair and brought out many of the "Old Guard" of the last six years . . . Established as he is now, the Army career Joe considered while at Camp Roberts, is now behind him . . . Among loyal Loyolans prominent at the soiree was **CHARLES BOWERS**, '29. He was graduated in the depth of the depression but with courage and fortitude he survived nobly. Active in the practice, he is a member of the firm of Spray, Gould and Bowers . . . Observers note that recently he was looking out towards the sunset sea and showed interest in some form of "Leisure World" . . .

Investment counsellors on Spring Street who knew Charlie since he was claims adjuster, are eager to inform clients, that five will make them ten, he doesn't do it . . .

THOMAS CLIFFORD MURPHY, '40, recently appointed to the Municipal Court in the Los Angeles Judicial District, lost no time in putting to work his recently acquired authority . . . He received his baptism of fire in Traffic Court . . . Here he brought much understanding sympathy to work with him and demonstrated his patience to the point almost of snapping, that it was quite obvious to the initiated that this was his meat and drink and started him on the climb to judicial eminence . . . **JUSTICE OTTO M. KAUS**, '49, at the invitation of the Presiding Judge, addressed the recently appointed Judges of the Superior Court at induction ceremonies late in September . . . They were eight in all and included one Loyolan, the Honorable **JAMES D. TANTE**, '48, . . . Jim has been moved up higher in judicial circles in recent days, with such deserved regularity that we have had many occasions now to appreciate this recognition of judicial talent . . . In fact, Tante and Talent are correlative terms . . . The Justice, no matter what his assignment, never fails to perform with the know-how and excellence that becometh an Aggeler Scholar . . .

FRED MARTINO, '39, Alumni President, performed with his fine touch of finesse as host at the Symposium, now an established tradition at the State Bar Convention . . . Not seen there was **JOHN T. HOURIGAN**, the country lawyer from Delano . . . the first time he was neither present nor accounted for since the memory of man runneth not to the contrary . . . Even bucolic neighbor Louis LaRose who is generally able to account for his whereabouts, isn't talking . . . **HAROLD A. ABBOTT**, '53, is domiciled in an isolated spot in northern California where one has to go to on purpose . . . Susanville, the county seat of Lassen, will never be reached by accident. To get to this spot takes determination and resolve . . . Harold did just that and liked the place so much he remained and today practically runs the county . . . He's doing a great job in the war on poverty and serving as Public Administrator and District Attorney . . . **MARY GERTRUDE CREUTZ**, '54, always reliable in providing the fine feminine touch to Bar Activities, at both state and local levels . . . Just now she is second V.P. of the Lawyers' Club . . . Another plateau or so and she's in . . . And fortunate is the Group that has her leadership.



A DUMPORS CASE

THE MAN FROM U.N.C.L.E.

(Continued from page 21)

As the door opened they rushed simultaneously to grasp the small, white pamphlets that meant victory or defeat.

Jubilant, Bond discovered the holding in the case just decided was in his favor. He now had his case in point and the long hours of labor would be rewarded. Ferne would be put out of court. It occurred to Bond that since she would be out of court, perhaps she was free for dinner. The remainder of the evening would now be contingent on Ferne . . .

BOARD OF BAR GOVERNORS

(Continued from page 22)

be held as a gala after final party, informal beer busts at the school, development of a pre-legal committee to inform undergraduates at various local colleges as to what a legal education entails, and many other projects now in the process of development.

This semester has started out on a high note, the note of accomplishment. We hope to continue this spirit by adopting programs of interest to the student body and providing the resources to develop your interest in the law besides the fundamental book learning.

The board, as your representative of the student body, can only develop on your ideas and interest in achieving the best for Loyola Law School. We are willing and able to serve.

NEWS FROM THE LAW LIBRARY

(Continued from page 28)

month of its operation we have already produced over 3,000 copies.

On September 13, the Law School celebrated the *World Law Day*, and the Law Library contributed through a book exhibit on *World Peace Through World Law*. This exhibit is still on display in the Library's Lounge-Browsing Area during the month of October incorporates four major areas: the first one pertaining to the *Legal Regulation of World Trade and Commerce*, the second containing basic documents in the field of *World Law*, the third showing materials in the field of *International Organization*, and the fourth presenting reports of the *International and World Courts*.

FALL, 1965

A.L.S.A. SUMMER CONVENTION

(Continued from page 10)

ALSA by the ABA. Thus ALSA serves both the individual members and the member associations.

The convention is set up to meet three goals. First, the delegates meet to transact such business as is necessary to keep the Association a functioning organization. Second, the delegates meet to discuss problems and programs encountered and established at their individual schools. Third, the delegates meet to broaden their own education through seminars presented by leading jurists in the United States.

The first of these goals is self-explanatory. It involves the election of officers, reports of committees and the presentation of resolutions and amendments.

The second goal was the most beneficial in that it gave each delegate an opportunity to discuss the problems faced by their member associations. If one school faced a problem another school had most likely already encountered and solved it. Through these discussions each delegate was able to get a number of ideas for programs that might be of benefit to his organization. Such topics as speakers programs, moot court, placement service, public relations, blood banks and student bar loans programs were a few that were discussed in detail in the round-table discussion groups.

The third goal, individual education, was also very successful. The theme for the Summer 1965 convention was "Education for Advocacy" and the talks and seminars presented followed this theme. There was a Questioned Document seminar, a Symposium on Baseball's Exemption from the Antitrust Laws, a talk on Advocacy in Trial and Appellate Brief Writing and a seminar on Trial Techniques in Criminal and Civil Cases.

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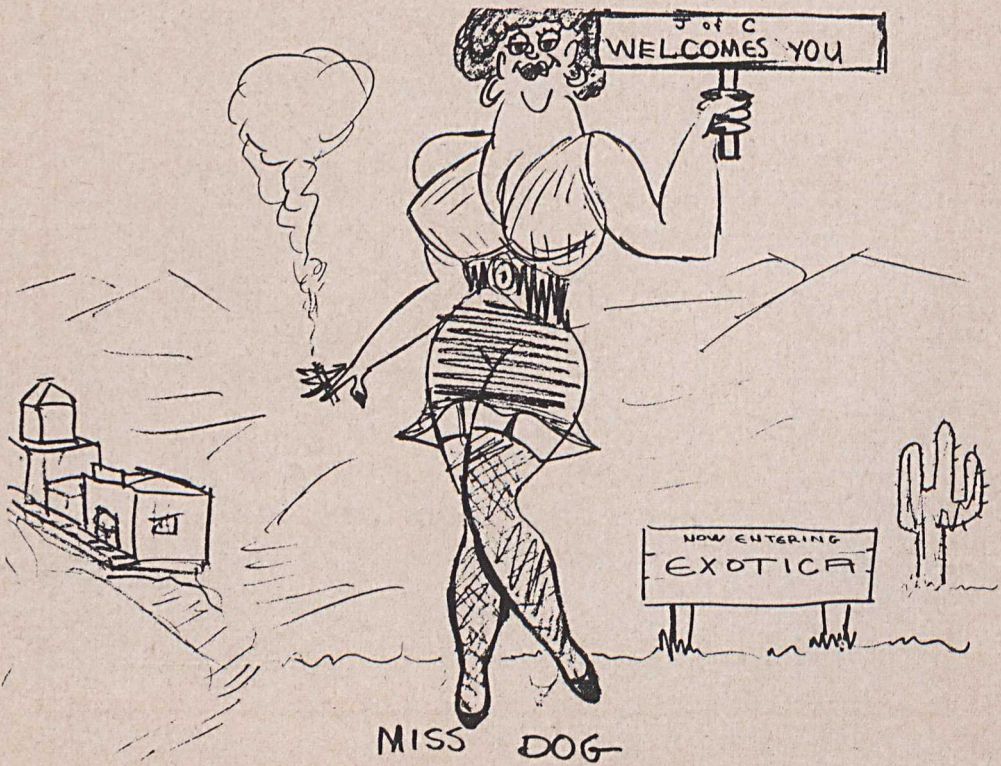
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