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TMLS CLASHES ON OBSCENITY

By Frank B. Myers

Obscenity and the Courts provided the focal point for the newly constituted Thomas Moore Law Society's second meeting, Saturday, March 13. Former Assistant District Attorney James Clancy opened the discussion with a review of the case law covering this controversial topic and added several resolutions for the nationwide problem of obscene films and literature. The round table discussion that followed didn't necessarily resolve the problem. Sparked by varying points of view, however, it insured TMLS's future success as one of Loyola's most prominent honorary scholastic institutions.

The St. Thomas Moore Society, well known to Loyola's alumni, gave way this year to the newer TMLS largely through the diligent efforts of Tim Sargent and Fr. Va- chon. The change, however, encompassed far more than just the name. At regularly scheduled meetings the TMLS discusses controversial areas of the law aided by selected members of the faculty and the legal profession. Membership, formerly open to the whole student body, should have been limited. Numbering approximately twenty, the society provides a forum for leading students to break the monotony of cases, statutes and notes by going deeper into the largely unresolved modern issues facing the legal profession.

The enthusiasm of the second meeting befitted TMLS's broad purpose. Members of the Black-Douglas school of thought supported the absolute freedom of speech allegedly guaranteed by the first and fourteenth amendments. "Congress shall make no law prohibiting the freedom of speech," means precisely that all speech is protected, and cannot be proscribed in any way by the Federal or State Governments. This position disposes of the problem in short order. Governmental bodies are powerless to prohibit the sale of any literary materials or the showing of any films, regardless of their content.

The consensus, however, was represented by a more moderate view. The state and local governments should have some power to restrict the sale and display of materials injurious to the community well being. The real problem is finding some workable system providing a free market place for ideas, yet restricting wholesale dealings in smut. As in the case of most moderate views, there is no easy solution.

Mr. Clancy, a veteran of many an obscenity prosecution, suggested that the present status of the law, in effect, is represented by Chief Justice Warren's dissenting opinion in Jacobellis v. Ohio, 12 L. Ed 2d 793 (1964). In six separate opinions the U.S. Supreme Court reversed an Ohio conviction based on the showing of the motion picture "The Lovers." The inability of the Court to agree on a basis for reviewing obscenity prosecutions evidences the great confusion in this area. Nevertheless, Mr. Clancy suggested that, as in the words of Warren, "the use to which various materials are put—not just the words and pictures themselves—must be considered in determining whether or not the materials are obscene." The denial of certiorari in numerous state prosecutions indicates that when substantial evidence on the whole record supports a jury's finding that the particular manner of display of a book or picture is contrary to the local standards of decency, the verdict will be upheld.

In effect, Lady Chatterley's Lover, or Fanny Hill could appear in a college book store or library, but not in a drug store frequented by innocent children. The twelve reasonable men of the jury would decide obscenity much in the same manner they decide negligence. Mr. Clancy suggested that by misreading the cases, local authorities have backed up from this very reasonable position and attempted to apply a nonexistent "national standard."

The discussion left the limits of obscenity and the First Amendment largely undefined. Yet, by more precisely defining the issues involved the TMLS took a step towards some solution to the problem. While polishing their armor for the next clash, the members extended thanks to Mr. Clancy for his invaluable assistance.

Blackstone's Commentaries

Should you be even in a remote way allergic to any sensation mildly identified with nostalgia, by all means do the same thing. A day with no purpose is a drudgery where Washingtonians stood as sentinels and gave a local habitation and a name to the "Old School" that was Loyola Law for a generation of the children of men. Of course, if you don't mind becoming tear-eyed, by all means, drop around for a look-see, but approach the spot in reverence, for it'll stir up hallowed memories. Another victim of urban progress, it fought a losing battle with nothing bull-top. Even "black acre," that mythical patch of land that was plowed, tilled, leased, conveyed and re-conveyed endlessly, provided untold eases.ments and never failed to produce a realistic glow in a troublesome problem of transferring title to a defaulting taxpayer, is a harmless nothing. What WALTER H. as in HOHFEII ... COOK ... didn't do with it, for it was as pliable as putty in his hands, and he tossed it about with the touch of the master. His career of Mr. Chips spanned the life of the Grand Avenue Mansion. He made "Readings on the Law of Contracts," the Book of the Century and a collector's item. None discussed on "rights, privileges, powers, and immunities" as did he and when he spoke the last syllable of the last word was said with ultimate finality. Only two scraggy trees are holding out against the invasion and tufts of foliage at middle height, make them look not unlike flags at half-staff. In the spirit of the scene a tear is dropped as the wayward wind whispers a requiem. This is a spot for memories. Here was installed the "Agger Plaque," the top award for "superior scholarship and noteworthy achievement". BALDO KRISTOVICH '35 was the first recipient and started a pageant of celebrities that fairly glowed with professional distinction. BALDO certainly gave it a superb start. Constant occupancy was his title to a secluded nook in the library, where, outside of his class, he could be found any hour of the day and not infrequently, at night, for well he understood that labor is the law of life for one who would prosper in the law. It's too bad that a plaque doesn't mark the spot where he made history, with some such words as, "Dedicated to the memory of BALDO KRISTOVICH '35 who did not sleep here."

His professional career moves at the same tempo as did his student years. Just now as Public Administrator of Los Angeles County he has the largest probable practice in Western civilization and the largess with which he distributes other people's wealth, makes Croesus and the Golden Boys of an opulent elder day look like most amateurs. Here, too, at the homey, compact Maison, ... where character was formed and intellect informed, the O'MELVENY trend was established, and GEORGE EIMENDORF '43 lost no time in

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hopping over to 433 So. Spring, as soon as he finished his comprehensive . . . GEORGE is still there and everybody involved was happy with the move . . . The way he administered the Loyola Bar Association . . . ODRA CHANDLER, '52, was its President in his Senior Year . . . it took neither a prophet nor the son of a prophet to foretell what his particular interest would be . . . As Mayor of Anaheim, he governs in his spare hours, the largest growing community in Southern California and if he could absorb his near neighbor, Disneyland, there would be no question as to the accuracy of this reasonable boast . . . All this he is doing while he discourses with discernment on the “Rule of Law” . . . STEPHEN POWERS, '49, has been doing nobly providing much of the power and lots of light to the Dept. of Water & Power, . . . no pun intended. . . just facts, . . . was given a leave of absence, to join the trio appointed by the Regents of the University of California to investigate how the taxpayers' money is being used to prepare the youth of today to be the citizens of tomorrow . . . From recent goings-on up Berkeley way . . . evidence so far makes it look like an investment gone sour . . . RAY ROBERTS, '48, continues to do the unusual . . . He landed in the Municipal Court via the plebiscite route . . . Most extraordinary, . . . and one of the very few judges in this area to achieve this distinction . . . Only a day ago, it seems, he reached the second plateau in his climb to judicial eminence when he was robed and inducted into office as a Judge of the Superior Court . . . Another accomplishment for the record books . . . Well, its just one of RAY'S better habits . . . and no matter at what level of the judiciary he's presiding he'll be always superior . . . Something new has been added to step up the effective prosecution of mail fraud cases, fraud by wire, and criminal tax cases . . . This newly created section is referred to as “Criminal Frauds” . . . To guarantee it the glow of modernity and to start it out at a highly effective level, the “something new” is none other than JO ANN DUNNE, '60, who has sparkled the U.S. Attorney's Office . . . Since her graduation from Law School, . . . the “cum laude” on the diploma of MARGARET KELLER, '49, represents the Hallmark of quality . . . “achievement beyond the demands of duty” . . . MARGARET came down here from Ventura and as soon as she was graduated, hurried back to her native bailiwick to give it the benefit of her enlightenment . . . She lost no time in establishing a reputation in legal circles . . . Skilled, understanding, intelligent sympathy and professional know-how were the ingredients that went into her success formula . . . The measure of her accomplishment is pretty well gauged by the fact that only recently she was elected President of the Ventura County Bar Association and became the first woman so honored in its long and impressive history . . . Incidentally, her election kept the Presidency in the Loyola Family, for she succeeds ROBERT W. FAIRBANKS, '53, who was so determined to become a lawyer that he left his native Fillmore to study at Loyola . . . Upon completing the course, he rushed back home a refined country lawyer, dispensing wisdom and culture to the rich agricultural area of Ventura's hinterland . . . Just when JUDGE KAUS, '49, was beginning to find his way around the labyrinthine Courthouse, and was more or less oriented as to the situs of his courtroom . . . he was apprised by the Governor that his services were required at a higher level of the judiciary and that he was being appointed to the District Court of Appeal . . . It happened fast but it couldn't have happened to one more competent and deserving . . . Not many more plateaus remain before supreme eminence is attained.

Phil Alpha Delta Law Fraternity in it's recognized tradition has announced an outstanding program of social and professional activity for the Spring semester. P.A.D. believes that a legal fraternity should serve some positive purpose in the life of each student member. The organization should do it's part in preparing each neophyte lawyer to take his proper place in the professional community. It is not enough that the organization act as nothing more than a clearing house for frivolity. Each student who enrolls in law school submits himself to the rigors and discipline required to enter one of this societies highest recognized callings. One of the requisites of our great profession is sociability, but another equally important and often overlooked is dignity. P.A.D. addresses itself to the combination of both of these qualities. We are not unaware of the criticism of this philosophy that generates both from without our ranks and even on occasion from within. In fact, we are grateful for these voices of dissension, that we might be ever conscious of our responsibility to the serious students of this school. The members of P.A.D. intend to have a good time and intend to continue to maintain an open door policy to those who wish to affiliate with and serve in a legal fraternity with a sense of responsibility. It is with these thoughts in mind that P.A.D. prepared for this Spring semester.

On Saturday, March 27, P.A.D. will host the first Invitational Golf Tournament. Phi Delta Phi has announced that they will enter a team in competition captained by Jim Waldorf. Captain for P.A.D. will be Mike Maloney. Individual trophies will be awarded and a perpetual plaque will be established in the school fraternity room.

The Magic Castle, a private club for the magicians' association, will throw open it's doors for the members of P.A.D. and their guests on the evening of March 28, 1965. An exquisite dinner and unusual entertainment has been planned.

Wednesday, March 31, finds the fraternity at the famous Playboy Club for lunch. After-lunch entertainment will be provided by Mr. William Tucker, a fraternity brother and member of the faculty.

On Wednesday, April 14, P.A.D. will sponsor the third of a series of tours and lectures to familiarize the law student with the governmental departments in which he will have to function in practice. This time we will emphasize criminal courts and procedure. There will be a tour of the sheriff's crime lab and the coronor's office. Open to all P.A.D. members and their guests.

The Annual Initiation of new members and installation of new officers will be conducted on Friday, April 23, 1965 in Dept. 12, Los Angeles Superior Court. The ceremony will be followed by a dinner and the presentation of awards.

P.A.D. takes pleasure in announcing another step in a continuing program of service to the school, the profession and the student. Upon approval of the faculty and administration, Phi Alpha Delta-Ford Chapter will present an award consisting of a set of basic practice codes to the first year student, both Day and Evening, who achieves the highest cumulative average during the first year of study. To be eligible, the recipient must also be an active member of Phi Alpha Delta. The selection will be made by the faculty members of the Fraternity. The award will be presented each year at the beginning of the Fall semester to the winners of the previous years.
THOU SHALT NOT MERGE:  
THE SUPREME COURT AND SECTION 7 OF THE CLAYTON ACT

by James J. Waldorf

In a series of recent decisions, the Supreme Court of the United States has extended the effect of the test “may be substantially to lessen competition” found in Section 7 of the Clayton Act to encompass almost any merger or business combination today. While the Court has not taken the position that any merger is proscribed by the statute, it is a rare case in which the merger of two companies will not have some probable effect on future competition to which Section 7 might be applied. In almost any field of corporate endeavor, a large business can be operated more efficiently than a small one. Any businessman is aware that it is often more expedient to acquire an existing business than to rely on internal expansion in achieving the growth requirements of a given enterprise. The task confronting legal counsel in determining the point at which a client may run the risk of injunction or judicial divestiture under the anti-trust laws remains formidable. The outer limits of Section 7 are by no means clear at this time.

The 1950 Celler-Kefauver amendment of Section 7 was unquestionably intended to plug the weaknesses of Sherman Act application to merger cases. The original Section 7 was applicable only to stock acquisition cases, and the merger solution offered a loophole to companies threatened with prosecution. See Swift & Co. v. Federal Trade Commission, 272 U.S. 554, 47 S.Ct. 175 (1926) and Arrow-Hart & Hegeman Elec. Co. v. Federal Trade Commission, 291 U.S. 587, 54 S.Ct. 532 (1934). The Sherman Act application to merger cases was seemingly restricted to situations of outright monopoly in the Columbia Steel case. United States v. Columbia Steel Co., 334 U.S. 495, 68 S.Ct. 1107 (1948), although the Court in United States v. First National Bank & Trust Co., 378 U.S. 665, 84 S.Ct. 1042 (1964), indicated that the Columbia Steel decision “must be confined to its special facts,” and that “where merging companies are major competitive factors in a relevant market, the elimination of significant competition between them, by merger, itself constitutes a violation of Section 1 of the Sherman Act.” 84 S.Ct. at 1037.

In spite of the possible extension of the Sherman Act which might be predicated upon the language in the First National Bank case, the more potent weapon of the government in merger cases has been provided by the Supreme Court under Section 7 of the Clayton Act, which reads in relevant part:

“That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

“No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.” (15 U.S.C. §18).

The legislative intention leading to the amendment of Section 7 was stated in Brown Shoe Co. v. United States, 370 U.S. 294, 82 S.Ct. 1502, 1522 (1962): “Congress used the words ‘may be substantially to lessen competition’ (emphasis supplied), to indicate that its concern was with probabilities, not certainties. Statutes existed for dealing with mergers or克莱斯默; to competition; no statute was sought for dealing with mergers with ephemeral possibilities. Mergers with a probable anticompetitive effect were to be proscribed by the Act.”

The first indication of the coming extension of Section 7 was given in United States v. Philadelphia National Bank, 374 U.S. 321, 83 S.Ct. 1715 (1963). In that case the Court held that Section 7 could apply to the merger of the second and third largest banks in the Philadelphia area notwithstanding the effect of the Bank Merger Act of 1936. On the other side, the utility is in the position of a natural monopoly; it is more difficult to subject the utility to scrutiny as it grows larger. Competition, if it is to be maintained at all in this area, must come initially. For this reason, the elimi-
nation of a major segment of probable future competition justified the application of Section 7 in this case.

The El Paso doctrine was extended in a novel fashion in United States v. Penn-Olin Chemical Co., 378 U.S. 198, 84 S.Ct. 1710 (1964). This case involved the formation of a new corporation on the basis of a joint enterprise undertaken by Pennsalt Chemicals Corporation and Olin Mathieson Chemical Corporation. The relevant product market was conceded to be sodium chlorate and the geographical market the Southeast sector of the United States. Pennsalt was engaged chiefly in the production of chemicals, including sodium chlorate, which was produced solely at Portland, Oregon. Olin was more diversified, and although engaged in the production of chemicals and chemical products, did not produce sodium chlorate. Olin had vast sources of distribution, including the Southeast.

The Court concluded that Section 7 was intended to apply to "joint ventures," on the reasoning that Congress had not intended to create what would otherwise be a significant loophole. The Court then concerned itself with the task of finding a probable substantial lessening of competition.

The evidence revealed that Pennsalt had desired to get into the Southeast market to satisfy the growing need for sodium chlorate in that region. Olin had been desirous of producing sodium chlorate, for which it had a ready market. The respective desires of the two companies led to the formation of Penn-Olin, whose sole function was the marketing of sodium chlorate in the Southeast. It should be noted that prior to formation of the joint enterprise, each company had been hesitant the Southeast sodium chlorate market alone.

The Court held that the emergence of Penn-Olin in the market might have foreclosed the possible future competition of Pennsalt and Olin in the Southeast sodium chlorate market. In remanding the case to the District Court, the majority made it clear that a finding that both companies would have entered the market was not necessary. Evidence showing that one of the companies would have entered the market in question, while the other remained on the threshold as a significant potential competitor would satisfy the prerequisites for invocation of Section 7.

In El Paso and Penn-Olin, the determination of the line of commerce and the geographical market was not disputed. Those cases involved situations in which the ultimate foreclosure of competition remained conjectural. In the following cases, the question will be one of determining the relevant product and geographical markets, as a basis for estimating the probable future effect on competition.

In the Alcoa case, United States v. Aluminum Co. of America, 377 U.S. 271, 84 S.Ct. 1283 (1964), the Supreme Court refused to sanction the acquisition of Rome Cable Corporation by Alcoa. Rome was engaged primarily in the manufacture of aluminum conductor. Alcoa engaged solely in the manufacture of aluminum conductor.

The Court emphasized that the line of commerce evidenced highly concentrated markets, dominated by a few large companies, served also by a small and diminishing group of independents. In the year prior to the merger, Alcoa led the aluminum conductor producers with 27.8% of the market; Rome was ninth with 1.3% of the market. The Court noted that Rome was an aggressive competitor, that its skills had been proven in the field of insulation, and that Rome had an active and efficient marketing organization. The conclusion of the Court is ultimately based upon the condition of competition in the industry, the position of Rome as a competitor, and the fact that the ninth leading producer of aluminum conductor would thereby be eliminated, even though Alcoa's increased share of the market would be only 1.3%.

The difficulty here, and the subject of a vigorous dissent by Justice Stewart, joined by Justices Harlan and Goldberg, concerned the determination of the relevant lines of commerce by the majority.

The aluminum conductor field was broken down into three segments: (1) bare aluminum conductor, (2) insulated aluminum conductor, and (3) the broader field of aluminum conductor, comprised of both bare and insulated aluminum conductor. It was conceded that bare aluminum conductor was a separate line of commerce. The controversy arose from a finding by the majority that aluminum conductor need not be combined with copper conductor as a line of commerce, and that aluminum conductor was a distinct line of commerce.

The dissent notes that, as between the insulated aluminum conductor and insulated copper conductor, there is a considerable degree of functional interchangeability. The dissent also states that neither of these products is recognized as a separate economic entity in the industry. Douglas, for the majority, points out that there is an absence of cross-elasticity of price between the two products; where insulated aluminum conductor can be satisfactorily employed, its copper counterpart is economically unfeasible. The dissent replied with the statement that numerous economic factors in addition to the cost must be considered.

The majority's position that the bare aluminum conductor and insulated aluminum conductor could be grouped together to form a relevant line of commerce is even more untenable. This is justified on the ground that both products are used to conduct electricity and both are sold to electrical utilities. The difficulty with this is that these qualities have not in any way excluded copper conductor. The inescapable conclusion which one must reach is that in spite of any attempts on the part of the majority to distinguish the copper conductor from the aluminum conductor, the insulated aluminum conductor is more nearly akin to the copper conductor than to the bare aluminum conductor in determining a relevant line of commerce under Section 7.

The only explanation for the result in the Alcoa case is that the majority gave vent to what it felt was the clear intention of Congress in amending Section 7, and then developed a line of commerce to substantiate this result. Steward, in his dissent, made his position on the policy question equally clear, stating that he felt such a merger merely constituted a diversification on the part of Alcoa, and as such, outside the intended scope of Section 7.

The decision in United States v. Continental Can Co., 378 U.S. 441, 84 S.Ct. 1738 (1964), left Section 7's "line of commerce" test in a state of pure conjecture. The Court here disapproved the merger of Continental, the largest producer of metal containers, with Hazel-Atlas, the third largest producer of glass containers. The geographical market concerned was between the United States and the principal foreign producers of container and glass container industries constituted a "line of commerce."

Separate lines of commerce were attributed to the metal container and glass container industries. The difficulty arises in attempting to correlate the two industries into a broader and more comprehensive line of commerce. The Court noted the existence of both interchangeability of use and cross-elasticity of demand with regard to both industries. It was also noted that price was only one of the factors affecting the cross-elasticity of demand, the cost of changing packaging equipment and consumer demands for a particular type of container with a given product tending to lower the cross-elasticity of demand in these industries. As to this, the Court said:

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"... though the interchangeability of use may not be so complete and the cross-elasticity of demand not so immediate as in the case of most intraindustry mergers, there is over the long run the kind of customer response to innovation and other competitive stimuli that brings the competition between these two industries within Section 7's competition-preserving proscriptions."

Extensive interindustry competition was cited. While the evidence was not sufficient to lead to a determination of just what the area of effective competition between the metal and glass container industries comprised, the Court is quite emphatic that it extends well beyond the finding of the District Court limiting it in terms of end uses to containers for beer.

The Continental Can case is a clear illustration of the importance of a realistic determination of the "line of commerce." In determining the probability of a substantial lessening of competition, the Court looks at the competitive factors which existed immediately prior to the merger or combination. In the Continental Can case, defining the relevant market to be the metal and glass container industries, it was found that Continental accounted for 21.9% of the market, while Hazel-Atlas was responsible for 31.1% of the market. As such, Continental ranked second and Hazel-Atlas ranked sixth. This is the basis for the Court's conclusion that the merger would result in a probable substantial lessening of competition. The percentages in the instant case would probably be insignificant if the Court had found that the relevant market consisted of an even broader container market, including not only metal and glass, but also plastic, paper, and several other possible types of container. In this broader line of commerce, the effect on competition here would probably have been negligible. The instant case is distinguishable from Alcoa on the basis that neither of the parties to the merger here manufactures the product of the other party, whereas Rome did engage to some extent in the production of aluminum conductor.

The only safe conclusion which one can draw from the recent cases is that the Supreme Court is making a policy determination to the effect that any merger between corporations of significant size must withstand a very broad application of Section 7 of the Clayton Act.

In the El Paso and Penn-Olin cases, the Court went a step beyond the certainty theretofore required in finding a probable lessening of substantial competition in the future. In the Alcoa and Continental Can cases, the Court determines the relevant market to be that which conveniently brings the merger within the ambit of Section 7. In the latter cases, the proposed merger consisted of absorption by a leader in one field of an established producer in a complementary field. In the Penn-Olin case, each of the participating companies had entered an entirely new segment of competitive endeavor. It could be argued that the "joint enterprise" in that case tended to increase competition rather than stifle it.

It would be unfair not to note that the Court in each of these cases weighed a great many factors in reaching its conclusion. It was often emphasized that competition in the respective industry was in a state of concentration in a few major companies, and that the companies desiring to merge had compiled a history of growth through merger. The cases have abounded in statistical data, which have been omitted from our discussion for the most part, all supporting the contentions of the Court. A hesitancy to accept the validity of such data cannot be avoided, since statistics are only as good as the premise upon which they are postulated. The Attorney General's National Committee to Study the Anti-trust Laws took this approach to the considerations to be made under Section 7:

"This analysis required by Section 7 is no more beyond the competence of the courts than the Federal Trade Commission. For both, the following market factors may be helpful in determining the competitive consequences of any particular acquisition. We do not, of course, imply that all, several, or any one of these guides may be significant or even relevant in a given case.

"It may be relevant, however, to study: (1) The character of the acquiring and the acquired company, (2) the characteristics of the markets affected, (3) immediate changes in the size and competitive range of the acquiring company and in the adjustments of other companies operating in the markets directly affected, and (4) probable long-range differences that the acquisition may make for companies actually or potentially operating in these markets." A.G.N.C. Report 124-125 (1955).

No one can predict with any great certainty the limits to which the Supreme Court will eventually ascribe to Section 7. Two interesting District Court cases which may prove noteworthy in the future are United States v. Pabst Brewing Co., 233 F.Supp. 475 (U.S.D.C., E.Wis., 1964) and United States v. Von's Grocery Co., 233 F.Supp. 976 (U.S.D.C., S. Calif., 1964).

The words of Justice Harlan, dissenting in Continental Can, (Justice Harlan dissented in each of the recent Section 7 cases), best serve to summarize the status of the law under Section 7 of the Clayton Act as it stands today: "The Court's spurious market-share analysis should not obscure the fact that the Court is, in effect, laying down a "per se" rule that mergers between two large companies in related industries are presumptively unlawful under Section 7." He goes on to say: "I have no idea where Section 7 goes from here, nor will businessmen or the antitrust bar . . . Hereafter, however slight (or even nonexistent) the competitive impact of a merger on any actual market, businessmen rest uneasy lest the Court create some 'market,' in which the merger presumptively damps competition, out of bits and pieces of real ones."
BAIL -- A Need For Reform

By Joseph E. DiLoreto

The bail system in the United States determines whether an accused person in a criminal proceeding shall be released or jailed for the interim period between arrest and trial. In the typical case, the accused is brought by the police before a magistrate or judge who advises the accused of his rights and who, in the exercise of his discretion, sets the bail in a monetary amount. The legal theory underlying this procedure is that bail is sufficient to insure the appearance of the accused at the judicial trial. If he is financially able to post the bond or hire a bondsman to post it for him he will be released, if not he must remain in jail until the trial.

Each ear, the freedom of thousands of persons charged with various crimes hinges on their actual ability to raise the necessary money to meet the bail. Those who go free do so not because they are innocent of the charge but because they can financially afford to purchase their freedom. The balance who are detained remain in jail not because of their guilt but simply because they are too poor. The tragedy of this system is that the indigent accused, who may have come in contact with the law for the first time must be detained until the date of trial, while many habitual offenders who may be more dangerous to the community gain their release through posting bail.

History of Bail in the United States

The United States Constitution does not specifically grant a right to bail. The Eighth Amendment states only that "Excessive bail shall not be required." Prior to the ratification of the Bill of Rights, Congress had provided in the Judiciary Act of 1789 that "upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death." It continued and stated that bail in Capital Cases would be discretionary depending upon the nature and circumstances surrounding the crime and the evidence adduced.

In the everyday administration of criminal justice in American courts, the legal rights of the accused to his pretrial freedom depend solely upon the completion of the commercial bail transaction. As early as 1912, the Supreme Court recognized that the bondsman's interest to produce the body of the principal in court is impersonal and wholly pecuniary. As early as 1912, the Supreme Court recognized that the bondsman's interest to produce the body of the principal in court is impersonal and wholly pecuniary. Justice Jackson pointed out that the principal in court is impersonal and wholly pecuniary. Today the accused's right to bail in noncapital cases was steadfastly defined, as Justice Jackson pointed out in Stock v. Boyle:

From the passage of the Judiciary Act of 1789 to the present Federal Rules of Criminal Procedure, the Federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail. This traditional right to freedom before trial permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

The American judges' discretion in setting pretrial bail in noncapital cases has consistently been intrepidted to allow latitude in setting the amount of bail. This primary proposition was pointed out in Stock v. Boyle:

The right to release before trial is conditional upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. Like this ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of the defendant.

It can be then restated, that the development of bail in the United States has for a single purpose the release of the accused with the assurance he will return at the date of trial. It may not be used to detain the accused through the setting of excessive amounts, and its continual validity when the accused is indigent or otherwise a pauper now may be drawn into question.

The Cost of Detention.

Those who cannot afford a bondsman generally remain in jail. Their loss of freedom is based upon no rational relation to the gravity of their offense or the likelihood of their appearing at trial. They cannot be released on personal recognizance because they cannot furnish sufficient surety or afford the required collateral. A resolution adopted by the National Association of Attorneys General on July 3, 1963 stated:

Many persons accused of crimes are incarcerated for various periods of time because of their inability to post bail, although often not indicted for the crime or later found not guilty after trial, resulting in loss of liberty, separation from families and loss of employment as well as expense to the state in the cost of confinement (and) relief for dependents.

These costs of pretrial imprisonment in the United States, in terms of time, money, and human suffering are staggering.

In fiscal year 1960, 23,811 persons accused of federal offenses were held in custody pending trial. The average length of their detention was 25.3 days. Detention ranged for a low average of 2 days in some districts to a high average of 110 days in the Eastern District of New York. In 1963, those persons detained within federal confines spent an estimated 600,000 jail days in local prisons, at a cost to the federal government of $2,500,000. In a recent study conducted by the New York Bar Association the localized cost to selected large cities was uncovered. In St. Louis the average cost of detaining one accused was $2.56 per day, $2.61 in Atlanta, $3.82 in Washington, D.C., $4.25 in Philadelphia, $4.28 in Chicago, $6.25 in New York and $6.85 in Los Angeles. These figures reflect only the variable costs such as food, clothing, supervision, and medical care. These figures in no way reflect the fixed costs; items like construction and maintenance of buildings, and the alternative use the facilities could be put to.

More important than the economic burden on the taxpayers is the personal toll upon the detained and his family. His home may be disrupted, his family humiliated, his relations with his wife and children unalterably affected. The man who comes to jail for failure to make bond is treated in almost every case and in every jurisdiction as a convicted criminal serving a sentence. In the words of Jones V. Bennett, Director of the United States Bureau of Prisons, When a poor man is arrested, he goes willy-nilly to the same institution, eats the same food and suffers under the same hardships as he who has been convicted of a crime. The well-to-do, the rich, and the influential on the other hand find it requires only money to stay out of jail, at least until they have had their day in court.

Alternatives to the Bail System.

1. Manhattan Bail Project.

In 1964, the Vera Foundation's Manhattan Bail Project pioneered the fact findings process in New York City by launching a program in conjunction with the Felon Division of the Magistrate Court. Assisted by the Ford Foundation grant of $115,000 and staffed by New York University law students under the supervision of a Vera Foundation director, the project interviewed approximately 30 newly arrested feony defendants each morning prior to arraignment. The accuseds for the most part were indigents who would be represented by counsel appointed by the court. The students obtained information relating to employment, family, residence, and prior record. A point system was used to evaluate these factors and arrive at a recommendation. For each defendant determined by the project to be a good parole risk,

1. 1 Stat. 73, 91 (1789); Carlson v. Landon, 342 U.S. 524 (1952).
3. 342 U.S. 1, 4 (1951).
4. Ibid.
7. Address, February 24, 1939.

(Continued on page 7)
a summary of the survey was sent to the court recommending parole. If parole was decreed then the project staff remains in touch with the defendant and sees that he is reminded of his obligation to appear in court on the trial date.

Up to date, a total of 2,630 persons have been so released. Of these only 24 have failed to appear. Thus the efficiency of the system has demonstrated a record of over 99 per cent appearance at trial. The financial savings to the city in having to support the defendants in jail is substantial; however the financial benefit to the individuals themselves and their families in not being kept from gainful employment is much greater, and the human benefit to them and their families is incalculable.

2. Release on Recognizance.

Once the facts about the accused's community roots are known, the court is in a position to individualize the bail decision. Increasing attention has been given in recent years to opportunities for the release of defendants on their own recognizance; their promise to appear without any further security. A great many state and federal courts have long employed this device to allow pretrial freedom for defendants whom the court or prosecutor personally know to be reliable or “prominent” citizens. But for the past three years we have seen the practice extended to many defendants who cannot raise bail. The Manhattan Bail Project has demonstrated that a defendant with roots in the community is not more likely to flee, irrespective of his lack of prominence or ability to pay a bondsman. To date, these projects have produced remarkable results, with vast numbers released, few defaults and scarcely any commissions of crime by parolees in the interim between release and trial.

3. Summons in Lieu of Arrest

By definition, release on recognizance is a device to restore the liberty of an accused who has been arrested and brought before a magistrate. To the extent that such releases can be granted in large numbers and with small risk of default, they should be utilized to identify appropriate defendants—the arrest process might be avoided altogether.

To bypass arrest and bail in less serious offenses, extended use of the summons or citation has long been urged. Basically, these devices are orders issued by a judge or police officer to the accused, directing him to appear in court at a designated time for hearing or trial. Recently the Attorney General's Committee endorsed the summons for “those cases in which arrest is not required to protect the proper functioning of the criminal process.”

Although approximately 28 states and the federal courts have statutory provisions for judicially issued summons in lieu of warrants, or for police citations in lieu of sight arrests, their use is presently limited largely to traffic offenses and violations of municipal codes and county ordinances. Yet, in a variety of situations involving minor crimes or misdemeanors, estimated to constitute over 90% of all American crime, a comparatively small likelihood that the defendant will flee suggests little need to invoke the arrest process with its consequent reliance on bail.

Conclusion

Studies dissecting the ball system have been conducted for a good many years. Their uniform conclusion is that the system has not worked in an equitable manner. Accused persons in large numbers in all parts of the country are forced to spend the interval between arrest and trial in jail. Most are detained only because they cannot pay the bondsman’s premium or put up the collateral he asks. They lose their jobs and their family life is disrupted. Their chances for acquittal are lowered; their opportunities for probation diminished; their quest for equal justice handicapped.

The trouble with the present system is that by relying on the false security of money, too many poor are needlessly detained; it also protects too little against the dangerous. The recent decisions of the Supreme Court concerning the indigents right to counsel both at the trial and the appellate levels indicate that a man’s financial position does not determine his position of equal protection under the law.
In Defense of Dorado
By John F. Harris

An unusual Petition for Re-hearing was filed before the Supreme Court of California. This petition, filed September 15, 1964, was exceptional in that it was signed by no less than the California Attorney General, three deputies Attorney General, fifty-six district attorneys, one hundred ninety-four Chiefs of Police and the Sheriffs of thirty-nine counties. The Supreme Court was quick to act and on September 24, 1964, granted a re-hearing.

The case that aroused such fervor among the law enforcement and prosecutorial agencies of this state was People v. Dorado, 61 A.C. 892, 40 Cal. Rptr. 264, 329 P.2d 952 (1964), vacated, 62 A.C.—, 42 Cal. Rptr. 169 (1965).

The events leading up to the further and ensuing petition were as follows. Robert B. Dorado, age 26, was serving a life term in San Quentin Prison for the sale of marijuana. According to prison officers, they discovered on December 12, 1961, the body of Navarez in the the lower prison yard behind some bleachers. Navarez died 20 minutes later from multiple stab wounds in the chest. Suffice it to say that all evidence led directly to Dorado.

Approximately an hour later, between 9:00 and 10:00 A.M., officers brought Dorado into the Captain Hocker, and official of San Quentin Prison. In order to examine the defendant for superficial cuts and scratches which might have been inflicted in the fatal skirmish. Captain Hocker requested defendant to strip to the waist. After he had dressed, he was shown a blood stained jacket with his name on it found near the scene of the crime. He made no comment. Captain Hocker then requested Officer Glacic to take defendant to the hospital. With no further provocation in order that a technician might remove and test some brown flecks on defendant's hands which appeared to be dried blood. After defendant's return about an hour later, Mr. Midyet from the district attorney's office arrived.

Mr. Midyet and Captain Hocker testified at the trial that early in the afternoon, in the course of an interrogation lasting about two hours, defendant confessed the killing. More confessions and interrogations followed in the next two days.

Note that by the time of confession eliciting interrogation, the forces of the state had been marshalled against Dorado. Investigation produced evidence of defendant's guilt had been conducted. Defendant had already been suffering from a mental condition which might have had an effect upon him. Not only the officer questioned him at the interrogation in which defendant ultimately confessed, the district attorney was there too.

The evidence as to what methods were used to obtain defendant's confession was highly conflicting. The court found the confessions to be voluntary, admitted them into evidence and found defendant guilty of malicious assault with a deadly weapon resulting in a fellow prisoner's death. A crime for which there is an automatic penalty of death. Pen. Code Section 190.2 (1965).

The California Supreme Court, on August 31, 1964, handed down its decision reversing the conviction. It accepted the trial court's determination that the confessions were not coerced. The following factors was evidence enough for the Supreme Court:

At the trial Captain Hocker testified that he not only initially interrogated the defendant but had been present during the major part of defendant's interrogation by members of the district attorney's office. He further testified that he did not at any time inform defendant of his right to counsel or of his right to remain silent. He did not hear anyone else inform the defendant; Mr. Midyet testified to the same effect.

The court ruled that once one of the officers had caused an investigation upon a particular person, they must affirmatively advise him of his right to counsel and of his right to remain silent. The court further declared that his constitutional right to counsel precludes the use of incriminating statements elicited by police during accusatory investigation un-

that less that is intelligently waived. In laying down this rule the court relied heavily on such recent Supreme Court of the United States' decisions as: Escobedo v. State of Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963), and Carnley v. Cochran, 369 U.S. 506 (1962). The Court made clear that any incriminating statements elicited from defendant after invocation of his right to counsel but before he has been clearly made aware of his right to have counsel and to remain silent must be excluded from evidence and failure to so exclude will result in automatic reversal.

Thus arose the furor and fear among police and prosecutors. They screamed "criminal coddling" and "unworkable rule." When the rehearing was granted, law enforcement and sighed and awaited its redemption from this temporary aberration. When the rehearing was granted, he was accused that could be imagined from the prophets' description.

On January 29, 1965, came not the redeemer but instead a Massiah and an Escobedo. The court vacated its August opinion and held unequivocally as follows:

We conclude, then, that the defendant's confession could not properly be introduced in evidence because (1) the investigation was no longer a general inquiry into an unsolved crime but had begun to focus on a particular suspect, (2) the suspect was in custody, (3) the authorities had carried out a process of interrogations that lent itself to eliciting incriminating statements, (4) the authorities had not effectively informed defendant of his right to counsel or of his absolute right to remain silent, and (5) the evidence establishes that he had waived his rights. The fact that evidence apart from appellant's statements to the police almost conclusively established his guilt was held not to alter this result.

Finally, we cannot dispose of the introduction of the illegally obtained confession upon the ground that is constituted merely harmless error. Although under some circumstances the introduction into evidence of statements obtained from a defendant during police interrogation in violation of his right to counsel and his right to remain silent may constitute harmless error, we are convinced that the error is necessarily prejudicial when the statements are confessions.

The only ray of consolation for law enforcement officials is the California Supreme Court on that day was in a decision in a different case, In re Lopez, 62 A.C.—, 42 Cal. Rptr. 188 (1965). In a well written and reasoned opinion by Justice Tobriner, the court held that the rule extending the defendant's right to counsel to pre-indictment interrogations would not to be applied retroactively on collateral attack.

Law enforcement and prosecutorial agencies have attacked the Dorado decision on three grounds and complimented it on one. They contend:

I. The decision is not historically justified.

II. The decision is without American legal precedent.

III. The decision will seriously impair law enforcement and handcuff the police in their investigations.

IV. Then the attackers sigh, "Well, at least its not retroactive."

While there is room for intelligent difference of opinion, the four premises of the law enforcement agencies are founded on what the writer believes to be misconceptions. The rest of this article is devoted to support of and comment on the California Supreme Court's decision.

THE DECISION IS HISTORICALLY JUSTIFIED

It is undoubtedly true, as the attackers contend, that the founding fathers at the adoption of the U.S. Constitution would not have introduced the Sixth Amendment right to counsel to ex-
Dissent From Dorado
By Donald Parrish

The case of PEOPLE V. DORADO, 62 A.C. 350, decided by our State Supreme Court last January, has been termed one of the most important decisions in the criminal law area in recent times. Prior to DORADO, one accused of a crime had the right to an attorney under the United States Constitution from the moment of his indictment. Before formal indictment, police officials could question a suspect in private. They were under no obligation to inform the suspect of his Constitutional right to remain silent, and the interrogation was over and an indictment lodged. Admissions of guilt prior to indictment were admissible in evidence as long as the admission was a voluntary one.

Under DORADO, the right to counsel now matures at the "accusatory stage" of the police investigation, which may or may not precede the indictment. A defendant has a Constitutional right to an attorney and must be informed of this right at the moment "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into custody, the police carry on a process of interrogation that leads itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied the "Assistance of Counsel in violation of the Sixth Amendment to the Constitution as made obligatory upon the States by the Fourteenth Amendment, and no statement elicited by the police during the interrogation may be used against him at a criminal trial." The court went on to say that "it would exalt form over substance to make the right to counsel, under these circumstances, depend on whether at the time of the interrogation, the authorities had secured a formal indictment."

In DORADO, the defendant had appealed from a judgement of conviction for murder and a death penalty. Dorado was serving a life sentence in San Quentin Prison for selling marijuana. In December of 1961 one Nevarez, a fellow inmate, was found stabbed to death in the prison yard. Upon investigation, officers discovered a blood-stained blue denim jacket with the prison identification number cut out, but the name "Dorado" was on the pocket. The officers located the defendant in his cell, and under a stack of clothing they found the defendant's bloodstained trousers. On the defendant's hands were brown flecks, the dried blood of the inmate Dorado had stabbed to death. Dorado, an accomplice of Dorado admitted he held Nevarez while Dorado time and again stabbed Nevarez in the stomach and chest.

Dorado was brought to the office of an official of San Quentin, and questioned concerning the crime. The defendant was shown the blood-stained jacket which bore his name, and when told that Nevarez was dead, the defendant wept. Dorado then freely admitted his guilt before he had been formally indicted.

The trial found that the confession of the defendant was coerced. On appeal, the supreme court of this state in a 6-3 decision accepted this finding, but nevertheless overruled the conviction relying on the ESCOBEDO case.

Prior to the defendant's admissions of guilt, Dorado was denied his Constitutional right to remain silent, and of his right to counsel. When Dorado was first questioned, "the investigation ceased to be a general inquiry into an unsolved crime and had begun to focus on the defendant." It was at this time Dorado's constitutional rights matured. At the commencement of the interrogation the accusatory stage of the investigation had been reached.

In failing to inform Dorado of his Constitutional right to an attorney and of his right to remain silent, the Court said admissions of the defendant as to his guilt and the defendant's account of the crime should not have been admitted into evidence. Under these circumstances, "the prosecution cannot introduce into evidence defendant's own incriminating words." If they are so used, the result is a denial of due process under the Fourteenth Amendment of the United States Constitution, and a new trial must be granted regardless of the other evidence of guilt. Improperly introducing incriminating statements of the defendant, obtained in violation of his Constitutional right to counsel by failing to inform the accused of this right prior to his admission of guilt, trespasses the protection of due process no less than illegally introducing a coerced confession. In either case, the Court said, appellate courts cannot inquire into the prejudicial nature of introducing an illegally obtained confession. Guilty or not, the defendant must be given a new trial.

Until the rule of DORADO and ESCOBEDO has been made clear in the courts, precisely what "accusatory stage" of the investigation means must be left somewhat to speculation. Many writers fear that the rule is very broad, and may result in a Constitutional duty imposed upon law enforcement officials to inform a suspect of his right to an attorney and his right to remain silent long before the actual arrest and interrogation. As analyzed by Attorney General of this state, the rule will of necessity do away with undercover agents who now form a vital part of every large city police force. Justice White observes in his dissent to ESCOBEDO that the rule is "wholly unworkable and impossible to administer unless police cars are equipped with public defenders and under-

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... tend to predetermination and interrogation. There is a reason for this. Police investigation, at least as we know it today, was not then existent.

It may surprise those who seem to be the first to have seen a policeman, but there were virtually no police in the colonies. Indeed, of the original thirteen states, not one is known to have had a police force and only a few had prosecutors. The towns and cities did have constables and magistrates, but these were mostly old men taking advantage of an elder day version of the Great Society pension. Constables and magistrates seldom made arrests except pursuant to the fresh pursuit by private citizens after a hue and cry. There was little investigative power and were subject to suit for false arrest if they made a mistake.

The investigation of crimes committed outside the presence of witnesses was at best a haphazard and casual process. A person who suspected a particular man of a crime could, if he was that interested, privately conduct an investigation, using private investigators and offering a usually privately donated reward. Having assembled the evidence, he would present it himself before a grand jury which might return an indictment. The officers and the district attorney elicited the admissions. The investigation had already occurred, and at that point of focus, the state's forces were amassed against the accused. The writer's previous article, "Investigating Investigator," has been published in this volume of the Loyola Digest. Today, criminal trials often seem like little more than an appeal from the police interrogation.

In the former setting the framers of our constitution lavished a dozen specific provisions on the conduct of trial. In short, the framers determined to see that trials were conducted with the utmost fairness. Today, the point of confrontation has been pushed back from the trial to the police station or, before that, Dorado was interrogated without friend or counsel, in secret, and not before a jury of his peers. The officers and the district attorney elicited the admissions. The investigation had already occurred, and at that point of focus, the state's forces were amassed against the accused. The writer's previous article, "Investigating Investigator," has been published in this volume of the Loyola Digest.

The facts of the Dorado case which it squarely within the Escobedo rule except that Dorado did not retain or request counsel. The question then in Dorado was whether the failure of the accused to retain or request counsel justifies the application of a "formal process" as of the kind of Escobedo. The court in deciding Escobedo relied a great deal on the language of the case of Carnley v. Cochran, 369 U.S. 506, 513 (1962); ... it is settled that where the assistance of counsel is a constitutional prerequisite, the right to such assistance may not be denied. (Id. at 518.)

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THE DECISION IS AMPLY SUPPORTED BY AMERICAN JUDICIAL PRECEDENT:

In Gideon v. Wainwright, 372 U.S. 335 (1963), the Court held the right to counsel to be one of those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgement by virtue of the Sixth Amendment and equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment.

Finally, we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We are dealing here with a defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status had fortiﬁcantly prompted him to make it.

It is interesting to observe that two out of the three dissenting justices agreed with the above statement. Thus, it is clear that the Dorado decision is not only supported but is demanded by the recent United States Supreme Court decisions. By applying the rule announced in Carnley v. Cochran, we obviate the only distinction separating the facts in Escobedo from those in Dorado. THE DECISION WILL NOT SERIOUSLY IMPAIR LAW ENFORCEMENT OR HANDCUFF THE POLICE IN THEIR INVESTIGATIONS:

It would be presumptuous if not absurd to say that the job of law enforcement will not be made somewhat more difﬁcult by the Dorado decision. But the rule of Escobedo and Dorado has been tested and found workable. It is simply a change in keeping with our times. Due Process has always meant fairness, but our conceptions of what is or is not fair are constantly changing. As Chief Justice Weitbraub so aptly stated in State v. Smith, 37 N. J. 481, 181 A.2d 761, 762 (1962):

Concepts of justice change. Doctrines, incomprehensible today, were once embraced by judges who in

8. Id. at 1041.
9. The writers historical argument is lavished a dozen specific provisions on the conduct of trial. In short, the framers determined to see that trials were conducted with the utmost fairness. Today, today's criminal trials often seem like little more than an appeal from the police interrogation.

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Concepts of justice change. Doctrines, incomprehensible today, were once embraced by judges who in
IN DEFENSE OF DORADO  (Continued from page 10)

their times were doubtless the epitome of the reasonable Doubt. Surely this is so long-range retrospect. It is equally true that at the moment of change the choice is not necessarily between dead right and dead wrong. The judicial scene is studded with issues upon which the Constitution is silent; and, commendable and respectable support. When a court alters its course, it is often but a preference, a belief that justice is better served in another way, with no intimation that whoever disagrees must be mean or insane.

Thus the majority of justices on the Supreme Court have decided that fairness to the accused today demands that he have the right to counsel at the earliest possible moment, the moment to ponder over the constitutional rights which en- 

The United States Supreme Court performed the balancing test and the California court was forced to follow suit. Others had adopted the same standards prior to the recent majority decision on collateral attack. The California court was not oblivious to the fact that this would create an added burden on law enforcement agencies. It simply decides that this burden is justified when balanced against the rights of an accused who might otherwise be made to stand without a buffer between him and the marshalled forces of the state.

The United States Supreme Court rendered the Escobedo decision and gave his reasons for police and prosecutorial agencies. It simply decides that this burden is justified when balanced against the rights of an accused who might otherwise be made to stand without a buffer between him and the marshalled forces of the state.

Experience, then, teaches that the law enforcement agencies who have made an effort to operate within the rule have not been rendered ineffective.

While the courts seldom posit the argument, it seems that denial of counsel at the earliest accusatory stage has long rendered the defendant's investigation ineffective. The argument could be made that the main reason for excluding from evidence investigatory results gathered before the opportunity to consult with counsel, is not to prevent the truth from slipping out. On the other hand, the defendant, if we indulge the presumption of his innocence, may well have an interest in gathering evidence of the truth in order to establish his innocence. It is well known that evidence of innocence may be as fleeting as the evidence of guilt that prosecutors are in such a hurry to uncover. Even in the simplest drunk driving case, a blood test which could prove innocence. Fingerprints probably vanish as quickly whether it is the accused or prosecution who does the searching. It is a fact that many criminals come from the most transient segment of our society where witnesses can slip away that might have proven an alibi true. There are no statistics on how many defendants have gone to prison because the jury did not believe the "missing witness story."

We reach this conclusion upon the basis of the three forgoing propositions. First, although the United States Supreme Court in Escobedo, by providing a suspect with an opportunity to obtain the protection of counsel at the accusatory stage, sought to eliminate conditions which invited coerced confessions, the ruling does not require a retroactive application. Second, new interpretations of constitutional rights have been, and should be, applied retroactively only in those situations in which such new rights protect the innocent defendant against the possibility of conviction of a wrongdoer who did not commit; the fact that defendant was denied counsel under Escobedo does not affect the issue of guilt. Third, an absolute rule of retroactivity as to interpretations of constitutional rights which envisage the correction of future practices would impair the administration of criminal law and ultimately result in constitutional rigidity. (Id. at 191.)

The California court, in this writer's opinion, stands on shaky ground and supports to have exploded the "splendid myth" of Blackstone that all constitutional interpretations are eternal verities that stretch backwards and forwards to infinity. While the court's refusal to apply the decision retroactively may be eminently reasonable, in view of the serious consequences that would flow from the opposite decision, it presents real constitutional problems. The assumption has always been that the constitution never changes. It is suddenly discovered that what has gone on for years is unconstitutional, but we assume that it was always unconstitutional and just never brought to light. If
The Supreme Court now suddenly drops this position, will it not have to admit to changing the constitution and thus admit to legislating?

There is no easy solution. The writer, despite diligent search, has not been able to unearth a single decision in which the United States Supreme Court has failed to retroactively apply a rule of constitutional due process in a criminal case. Indeed, just the opposite has been true. With the exception of a few cases, the Supreme Court has applied retroactively on collateral attack its decisions requiring procedural fairness at criminal proceedings that vindicated an indigent’s right to counsel at trial and on appeal that guaranteed an indigent’s right to a transcript of the trial and that imposed more stringent standards for determining the voluntariness of confessions. It is true that there are a host of lower federal court and upper state court cases in which retroactivity has been denied. These, however, well reasoned, decisions, do not bind the Supreme Court.

Professor Freund, in an otherwise excellent article, purports to cite one Supreme Court criminal case denying retroactive application, but that may be easily dismissed as not in point. That case, *James v. United States*, 336 U.S. 213 (1961) was a tax evasion prosecution for failure to report embezzled funds as income. The court had previously held that such ill-gotten gains were income. The court overruled its former holding but dismissed James’ indictment saying his evasion was not “willful” within the meaning of the applicable Internal Revenue Code Section. The case in no way involved a question of due process and so is readily distinguishable.

Thus, those who count on a non-retroactive application of the Fifth Amendment must fail. All of them only because the Supreme Court, unambiguously, has held that the Fifth Amendment applies only because the defendant did not object at trial or raise the point on appeal. The law does not require useless acts and objections at trial before these recent cases would surely have been useless. It would probably not only have been unavailing but actually prejudicial to a defendant’s cause to raise objections that he knew foredoomed to be overruled. Perhaps *Dorado* will provide the setting for the United States Supreme Court to answer these unanswering questions.

Speaking of *Dorado* as the setting in which rules will be changed, it is surely only a matter of time until California’s Penal Code Section 1535 is declared unconstitutional. This statute presently provides that an accused may be interrogated for three hours before he is allowed to telephone his attorney. The rule is not consistent with the Fourteenth Amendment Due Process as it is now interpreted.

In conclusion, while there is room for intelligent disagreement, the California Supreme Court had ample historical justification and legal precedent for the *Dorado* decision. The burden upon prosecutorial and police agencies is warranted when balanced against the needs and rights of the accused. The police can and must learn to operate effectively and at the same time form the accused of his constitutional rights to consult with counsel and to remain silent. The ruling will work changes in the laws of California and probably many other jurisdictions. Whether or not the decision must be applied on collateral attack, remains one of the legal ponderables of the Dorado decision which may and should receive U.S. Supreme Court clarification.

DISSENT FROM DORADO

(Continued from page 9)

(Continued on page 13)
In DORADO, Justice McCoard of the dissent points out that there was a mistake in admitting the guilt of the defendant and that he was not prejudiced by not being advised of his right to counsel. The evidence of his guilt aside from his incriminating admission was overwhelming. Yet the majority reversed his conviction, stating that the use of the incriminating statements given in violation of the right to the accused to an attorney results in a denial of due process and requires a reversal regardless of other evidence of guilt. The majority stressed the severity of the death penalty, but failed to mention that it is just as serious a responsibility to nullify and make void a jury finding that Dorado was guilty of murder in the first degree and should be punished by execution in the gas chamber.

PEOPLE V. ANDERSON, 62 A.C.A.--, decided by our State Supreme Court the same day DORADO was decided, reversed the conviction of the defendant who had brutally stabbed a 13 year old girl because she refused to have sexual intercourse with him. Her nude and mutilated body was found by her 10 year old brother while the defendant was attempting to wash the girls blood from his hands. The conviction was reversed because the defendant willingly and freely admitted commission of the crime without being informed of his right to an attorney prior to the commencement of the questioning. The incriminating statements were coerced. The defendants admissions were true. Yet to protect Anderson's rights, the conviction was reversed. But what of the Constitutional rights of the dead girl and what of the Constitutional rights of her family? Was it not the rights of the next 13 year old girl to be confronted by Mr. Anderson?

PEOPLE V. PECKHAM, PEOPLE V. CURRY and JAMES, and PEOPLE V. POLLOCK; all three of these cases were reversed within a matter of 48 hours. The District Court of Appeals being compelled to do so in the light of the reversal of the decision of our Supreme Court in PEOPLE V. DORADO. In the POLLOCK case the defendant had been in the business of defrauding innocent people of thousands of dollars. In reversing the conviction and punishment, the Court said: "Suffice it to say that the evidence demonstrated beyond any reasonable doubt that the appellant perpetrated a bunco scheme." However, whether the defendant was guilty or not was of minor importance. Because the defendant admitted to police officers while driving to the station house that he was guilty and because the officers, taking Pollock to the station house had neglected to tell him prior to his admission of his right to an attorney and to remain silent and because his admission was a part of the lower court trial, the conviction was reversed.

There can be no doubt about it, criminals are being freed for the sake of the new rule. But the argument goes, we should design our judicial structure so that not one innocent man is wrongly convicted of a crime, even if it means that 100 guilty men are set free. The rules should favor the accused. But it might be asked, what if 200 guilty men are set free, or 500, or 1,000, or to be more precise, 1,700, this being the number of innocent men set free by the new rule. Thirteen decisions, they say, have been deprived of a fair trial as they were never told of their Constitutional right to an attorney prior to their case reaching the "accusatory stage."

When weighing the number of innocent men who will escape unjust conviction due to the new rule against the number of innocent persons who will suffer at the hands of criminals released by the Court's absolute application of the new rule to free the accused, the question is amply qualified as a result of ESCOBEDO and DORADO seems to be a step backward. These decisions forget that the purpose of the Constitution is not limited to the right of a criminal to have an attorney, but to every citizen as professional and personal. It is important to converse with the faculty in a different atmosphere. Some of the more reckless members may even be coaxed into doing the same thing as the Fraternity. The fraternity has passed a resolution that it will not settle for the twist.

The semester will reach its social culmination when the pledges are installed at the County Courthouse under the very intense scrutiny of the public. This social engagement was not simply distractions for mentally weary students. They were the catalysts that generated an "espirit de corps." The social engagements were the catalysts that generated an "espirit de corps." The social engagements were the catalysts that generated an "espirit de corps." The social engagements were the catalysts that generated an "espirit de corps." These social engagements were not simply distractions for mentally weary students. They were the catalysts that generated an "espirit de corps." The social engagements were the catalysts that generated an "espirit de corps." The social engagements were the catalysts that generated an "espirit de corps." These social engagements were not simply distractions for mentally weary students. They were the catalysts that generated an "espirit de corps." 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**TIME FOR A CHANGE**

**THE J.D. VERSUS THE LL.B. AS THE FIRST PROFESSIONAL DEGREE IN LAW**

By John G. Hervey

Reprinted from the February 1965 issue of Obiter Dieta

My position is predicated on logic, policy, analogy and psychology. I favor unqualifiedly the J.D. degree as the first professional degree in law for those who enter law school with a prior bachelor's degree, based on the conventional program of four ears of successful college work.

Let me say preliminarily that I take it for granted that my listeners are familiar generally with the literature—at least conversant with the very able presentation of Professor Marcus Schoenfeld which appeared in the February 1963 issue of the Cleveland-Marshall Law Review and with the excellent Report of the AALS Committee on Graduate Study on the use of the degree of Juris Doctor which Report will be before AALS for action at this Annual Meeting. Dean Joseph A. Caughey of the University of Akron has prepared a splendid paper on this matter and I have his permission to lean heavily thereon in what I shall have to say.

Professor Schoenfeld has pointed out well (1) that the problem is both old and new—discussed seriously sixty years ago, revived during the thirties, and now discussed anew; (2) that "the academic degree is essentially a shorthand way of signifying that the holder has completed a specific course of study at an educational institution—the degrees being divided into bachelor's, masters' and doctors'; (3) that professional doctorates, e.g. M.D. and D.D.S., historically have been distinguished from "research doctorates," e.g. Ph.D., S.J.D.; (4) that "the nature of basic professional degrees is that they carry no implication of original research qualification, nor of creation of a substantial addition to existing knowledge"; (5) that once this system, or hierarchy, of degrees is historically established, the graduates are awarded "professional doctorates"—M.D., D.D.S., D.M. V. etc. If graduates of schools of medicine, dentistry, osteopathy, veterinary medicine, chiroprapy and optometry, none of which must have a bachelor's degree for admission, are to receive professional doctorates, why should the law schools lag behind? It simply does not make sense.

The J.D. should be conferred as a matter of policy. Law study involves tough, intellectual materials. It involves the highest mental processes in terms of ability to think deeply, critically and creatively. The same values and attendant problems and study that concern the philosopher, political scientist, sociologist, and economist concern the law student—the appreciation of value, the relation of society and human dignity in a free and affluent society.

As a matter of analogy, I need remind you only of the "professional doctorates" in the field of medicine, dentistry, and other fields heretofore indicated. These fields furnish adequate precedents for awarding a "professional doctorate" as the first degree in a professional field to the study of which the student brings a prior college degree. Bear in mind, if you will, that the great majority of the schools in other professional fields do not require a prior college degree for admission. Nevertheless, the graduates are awarded "professional doctorates" regardless of whether they entered with a prior college degree.

As a matter of psychology, I believe sincerely that awarding the J.D. will heighten the image of the law school in the minds of general university administrators and boards of control. In journeying about the country and visiting law schools, time and time again, in institutions at which the medical school gets preferred treatment, these people have said to me: "Why should the law school be preferred over undergraduate divisions of our institution? After all, the work which the law school does is another matter for another day. Let us get to the subject at hand."

The J.D. is the logical degree. As the late Professor Beale and Dean Samad have pointed out, it is absurd to award a second bachelor's degree. The LL.B. for advanced professional work to those who already hold a first bachelor's degree. This more especially when admission is based on standards that equal or exceed those of the graduate school or the other professional divisions of the parent institution. The usual amount of college work required is three years for medicine and dentistry; two years for veterinary medicine and osteopathy, and one year for chiroprapy and optometry. Practitioners in these professional areas hold professional doctorates—D.D.S., D.D.S., D.M. V. etc. If graduates of schools

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a former dean said quite frankly: “A professor in this institution is a professor. I don’t care whether he is teaching English, mathematics or law. They will not make mistakes.” No preference will be given to those who instruct in the law school.” His predecessor, at the time I had been engaged, had promised that law school salaries could be geared to the medical school scale. Boards of control and university administration have gone on to the allocation of funds to the medical schools, not to mention the departments of biological or physical sciences at the present moment, usually are non-parsonious.

The basic problem of the law school, other than motivation at the moment, is lack of adequate funds. They need and are entitled to more money. I know that many law school administrators have labored hard to educate those who provide and allocate the funds. Some have become discouraged and have resigned. Awarding the J.D. degree, in my humble opinion, induce university presidents and boards of control to think of their law schools as graduate or professional divisions and equate them with the medical schools. It would help to overcome the common practice of regarding the law school as “just another bachelor’s degree” divisions.

Finally, the J.D. degree is necessary to equate posture of lawyers who enter government service. The fact is that some governors, both federal and state, allocate a larger number of points, for purposes of salary increases and promotions, to holders of the J.D. than to holders of the LL.B. The holder of the J.D. degree “gets there firstest with the mosest” both in salary and rank, because governmental agencies discriminate between holders of the J.D. and the LL.B. Admittedly this is unfair to the lawyers in government service who entered law school with prior college degrees before, who upon graduating from law school received the LL.B. Moreover, one should not forget that there are many lawyers in government service who are stationed in Latin America and Europe. There are no less than 1,000 lawyers in the Army J.A.G. These are stationed at bases around the globe. It is embarrassing to these lawyers to be addressed as “Esquire” when their counterparts are addressed as “Doctor.” Our government lawyers in foreign countries are downgraded in esteem and respect when they hold the LL.B. only and their adversaries hold the doctorate.

You may as well ask: “What are the arguments against the J.D. degree? Your terminology is self-explanatory; reasonable, why don’t we do it?” The so-called arguments against it fall into several categories. First: it is argued that the law degree should not be called a “doctorate” because there is no specific research requirement. This objection simply rests on the lack of understanding of the inquirer—he does not understand the difference between the “professional” and “research” doctorates. There is no research requirement for the M.D., D.D.S., D.M., D.O., or D.V.M. Members of many boards of control of law schools simply are not aware of the distinction between “professional” and “research” doctorates. They need education on the point.

It is argued also that awarding the J.D. will discourage research degrees in law—it will downgrade the J.S.D. and S.J.D. degrees. There is no proof that this has been true up to past. My guess would be that the percentage of graduates of the University of Chicago Law School, which has conferred the J.D. for many years, who have gone on for the research doctorates in law compares favorably with that of the school which confers the LL.B. Moreover, the conferral of the M.D. in medicine or the D.D.S. in dentistry has not downgraded the research degrees in those fields—Master of Anesthesiology, Master of Biopsy, Master of Experimental Surgery, Doctor of Medical Science, Master of Gynecology and Obstetrics, Master of Internal Medicine, Master of Optometry, Doctor of Medical Science, and Master of Medical Science.

It is argued moreover, that the traditional degree is the LL.B. This argument rests on the mere simplicity of classification already has been established for professional schools and classification presents no obstacle.

First, the J.D. degree developed at the time when law study covered only two years. More quickly a.m. the J.D. is a first professional degree in law. The first faculty there date back to 1888. First degrees were in law—a doctorate in law. The teachers of Roman and Comparative Law will recall Inerius of Bologna and his teachings which followed the discovery of the Code Justinian. Subsequently, Bologna, conferred doctorates in divinity, medicine, grammar, logic, and philosophy in addition to the doctorate in civil and canon law. Thus it is that tradition is not against the J.D. degree.

The so-called tradition of the LL.B. degree developed at the time when law study covered only two years. In 1966, for example, 96 schools conferred the LL.B. and out of 36 required a high school education for admission. Although the period of law study covered only two years. In many schools, the program of law study covered only two years. Moreover, 16 others of the 96 had a period of law study of three years but admitted for study persons with less than high school education. Such was the so-called tradition as it had developed in American legal education by 1966. It is scandalous that it is neither. It is a “first professional degree in law.” The difficulty here would be no greater or different than in classifying the M.D., D.O., D.S., or D.V.M. A pattern of classification already has been estabished for professional schools and classification presents no obstacle.

It is argued by some that it will be difficult to process. I am strongly recommend that for such a degree in the law through the hierarchy of committees, etc. in the parent institution of which the law school is an integral part. The argument is that degrees are conferred by the parent institution and not by the law school and, thus, it is change in the degree would require favorable action by the University Senate and such committees thereof as may have jurisdiction. Such situations do exist. It is unfortunate, in my judgment, that any law school faculty should not have direct voice in the situation directly to the president and board of control of any institution which operates a law school. Even so, I cannot believe that either Senate or faculty committees in any institution worthy of a law school would veto a proposal which rests on logic and sound grounds of policy, analogy and psychology, if the law faculty be ready to undertake the education necessary among their collegiate associates. It may require hard work in some institutions but that is no reason to be faint-hearted. Assuredly the fact that such a recommendation would have to mount hurdles of faculty hierarchy in some institutions is no reason for failure to act in those institutions.

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society “protection under the law,” protection from Dorado, Escobedo, Anderson, Pollock, etc. A decision such as Dorado “may” protect one innocent man while letting thousands of guilty men free to prey upon their defenseless victims. It is simply a weighing process. As of now, the scales of justice are weighted heavily in favor of the criminal. The time has come for them to regain their equilibrium.

BECKER RETIRES

Professor Jacob J. Becker has announced that he will retire at the end of the current term. Professor Becker has taught Corporation, Negotiable Instruments, Mortgages and Legal Ethics at Loyola since he joined the faculty in 1935. He was Acting Dean from 1937 through 1941. He was the founding father of the Loyola chapter of Phi Delta Phi, Aggler Inn.

He will easily be remembered by the faculty, alumni and his present students. The reason why? Because—the comprehensive coverage of the courses, the hints on future courtroom behavior (or “what are you going to tell the judge?”), reminders to leave a little early to allow for traffic mishaps, and the Becker-Goldie Debate.

He leaves a legacy of well taught students who have a universal regard for a gentleman, teacher, a lawyer. He is undeniably a part of the Loyola Law School tradition that did not cease to exist when the structure at 1137 South Grand was razed.

TIME FOR A CHANGE—
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where the hierarchy does not exist.

In summary, let me conclude as I began. I personally favor unequivocally awarding the J.D. degree to those graduates of approved law schools who hold prior bachelor’s degrees based on the conventional program of four years of college work. That is my personal opinion and does not represent the official position of the Council of the Section, the Board of Governors or the House of Delegates of A.B.A. You know already, however that at the Annual Meeting of A.B.A. in the year 1906 the Committee on Legal Education recommended the adoption of a resolution favoring the J.D. degree for those “who have previously obtained a degree in arts or science.” There has been, so far as I can discover in reading the annual Reports of A.B.A., no retreat from that position. The position of the committee on Legal Education of 1906 and my position are based on logic, policy, analysis, and psychology.

I strongly recommend that the matter receive the earnest consideration of every approved law school. I believe sincerely that awarding the J.D. Degree as the first professional degree in law to those who enter law school with a prior college degree will upgrade the law schools in the eyes of the public and in the consideration given to law schools by boards of control and university administrators, all of which will redound to the credit of the profession, the improvement of the law schools, and the institutions of which they are a part.

ADVOCACY PROGRAM

The American Law Students Association program on Advocacy was held Saturday, Feb. 27, in the Loyola John F. Kennedy Moot Court Room. The event was under the chairmanship of Charles Jones, President of the Loyola Student Bar Association.

The presentation was through a panel consisting of the leaders of the California trial bar, Joseph A. Ball and Raoul D. Magana, and panel moderator Justice Otto Kaus of the Appellate Court of California, Second Circuit.

These gentlemen discussed advocacy at the various stages of the trial process, considering problems in connection with voir dire, opening statement, presentation of evidence, examination and cross-examination of witnesses, objections and final arguments.

Their solutions were as varied as the many situations encountered but their one overriding criterion was the same—that of good taste.

Members of the bar, University of Southern California and University of California at Los Angeles law students as well as the Loyola Law School students were in attendance.

NOON LECTURE SERIES

The first installment of the recently initiated Noon Lecture Series was presented February 24 in the Loyola John F. Kennedy Moot Court Room.

Speaker at the auspicious beginning lecture was Bernard E. Witkin of the San Francisco Bar and author of the highly regarded tomes on California Evidence, Procedure, Civil and Criminal Law.

Mr. Witkin focused his attention on the intricacies and nuances of jurisdictional problems with a seven-phase examination of the subject.

The series are open to practicing attorneys, University of Southern California and University of California at Los Angeles law students as well as the Loyola Law School Students.

DIBBLE SABBATICAL

Dean J. Rex Dibble began his six month sabbatical leave starting in February. He will devote much of this time to a paper on certain aspects of free speech.

In the interim Lloyd T. Cowen is the Acting Dean and Donald C. Cowen is the Acting Associate Dean.

EASTER GREETINGS

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