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The ADVOCATE is a publication of Suffolk University Law School. Our current circulation is 11,000. The ADVOCATE is published three times a year: orientation, fall and spring issues. The orientation issue is distributed to law students only.

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Due Process: From Magna Carta to the U.S. Constitution

by Jill Natola

Jill Natola, a second year student at Suffolk University Law School, wrote the following for her Legal History Class taught by Professor Cella.

The concept of due process of law, as we refer to it today, traces its origin back to Chapter 39 of Magna Carta. Granted by King John in 1215, at Runnymede, Magna Carta granted feudal rights to the barons and protected them against the whimsical justice of the King.¹ However, the wording of Chapter 39 does not follow the Patent of John, but rather that of the demands of the baronage, thereby including not only the nobility, but all freemen.² The barons' goal was "to prevent (King) John from substituting violence for legal process; from taking the law into his own hands."³ Little did the irate baronage realize the historical significance of their actions. Magna Carta became more than a harness for a tyrannical monarch, it became the benchmark for numerous political charters and declarations.

Chapter 39 provides:

"No free man shall be taken and imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers and by the law of the land."⁴

"Law of the land" is the operative language for the purposes of this paper. Within six centuries of the issuance of Magna Carta at Runnymede, "law of the land" had become synonymous with the phrase "due process of law," which was embodied in our Federal Constitution in the Fifth Amendment. With the plethora of due process cases before the Supreme Court in the last twenty years, the history behind this ever popular phrase may provide some greater insights as to its true meaning.

Magna Carta was not a statute. It was merely a personal treaty between King John and an enraged baronage.⁵ For this reason, the baronage pushed for reaffirmation with each subsequent monarch, beginning with Henry III in 1216. The day after Henry was crowned, Magna

Carta was reissued in his name.⁶ Due to the threatening presence of Prince Louis of France, the English nobles who rallied around the young king advised him to reissue the charter as a conciliatory gesture to those barons who now followed Prince Louis.⁷ Though John had accepted the terms of Magna Carta unwillingly, the advisors to the young Henry III, John's son, counseled him to accept them in good faith.

However, this first reissuance contained some substantial alterations from the Magna Carta issued at Runnymede.⁸ Henry omitted most of the restraints on the taxing power of the Crown and on the Crown's prerogative. Though Henry followed the letter of Magna Carta, he evaded the spirit of it throughout his reign.

"Magna Carta was . . . merely a personal treaty between King John and an enraged baronage."

A second reissuance came the following year. This reissuance was more significant than the first reissuance in that Magna Carta now became the permanent foundation for the government in England.⁹ Henry had sheriffs publish the character in their shires and supervise the enforcement of its provisions.

Magna Carta was issued a third time by Henry III in 1225. The earmark of this reissuance was the development of Chapter 39 into the final form it was to take.¹⁰ Subsequent reissuances by future monarchs used this language invariably. Reissuance became so customary that Magna Carta was reaffirmed during times of political crises and changes of reign by successive British monarchs for the next two centuries.¹¹

The Great Charter exerted its potent influence throughout the next two succeeding reigns. Edward I, son and successor of Henry III, sincerely embraced the provisions of Magna Carta, reissuing

it, as his father did, several times during his reign.¹² Unlike his predecessors however, Edward intended to put its provisions into practice. As a result, Edward devised the constitutional machinery necessary to enforce them. Before the end of the thirteenth century, England saw for the first time a working system of government headed by a monarch ruling in harmony with a representative Parliament.¹³

However, by the time Edward III was crowned, a century had passed since Magna Carta was first issued and now it had lost a great deal of the meaning it had once had for its contemporaries. With the development of Edward I's legal machinery, the King's courts had become the conservators of the people's rights and the guardians of the common law. The fixed procedural standards of these courts allowed the Crown to preserve law and order more effectively. However, their methods of meting out justice were of the type Magna Carta originally sought to prohibit.

The people complained of arbitrary imprisonments, deprivations of property, and interferences with the ordinary administration of justice by the King's Council and the Court of Star Chamber.¹⁴

In an attempt to correct these abuses, the House of Commons passed several enactments during the reign of Edward III embodying Chapter 39 of Magna Carta. The phrase "due process of law" was first used in one of these enactments issued in 1354.¹⁵ It is believed "due process of law" was intended to be synonymous with "law of the land" in that statute.¹⁶ This belief was buttressed by a direct implication to that effect in a statute issued in 1363.¹⁷ These enactments by Parliament were designed to curb the excesses of the King and his Council and to incorporate common law processes into the phrases "due process of law" or "law of the land" as a discouragement against the arbitrary exercise of power in the King's courts. Though Parliament continually struggled with the King and His Council over their procedures, with no ultimate resolution, the repeated confirmations of Magna Carta made it the basic symbol of

British constitutionalism by the end of the fourteenth century.¹⁸

During the fifteenth and sixteenth centuries, Magna Carta and due process of law lay undisturbed. Only brief mention was made to it in statutes and political opinions. For example, Sir John Fortescue makes no mention of Magna Carta in his treatise, *In Praise of the Laws of England*, or in his pamphlet, *The Governance of England*, both written about 1470.¹⁹ Its omission does not appear to be deliberate since there is ample evidence that Fortescue, a well-known political theorist, was well-acquainted with Magna Carta and did not hesitate to refer to its underlying principles in his work.²⁰ Fortescue stated in his treatise, *In Praise of the Laws of England*, that he believed that the right to a trial by a jury of one's peers according to the law of the land to be one of the most important advantages of the English system of government.²¹ During this period, Magna Carta was merely an ancient statute which rarely occupied people's minds.

However, in the seventeenth century, Magna Carta reemerged as the fundamental document of English constitutionalism as a result of the scholarly and political influence of Sir Edward Coke. Appointed to the Court of Common Pleas in 1600, Coke quickly became the champion of the common law and the opponent to the misuse of royal power.²² As a result, he was appointed Chief Justice of the Court of Common Pleas in 1606, and continued his meteoric rise, becoming Chief Justice of the Court of King's Bench in 1613.²³ It is probably fair to say that Coke's influence contributed tremendously to the development of what would come to be known as the "fundamental rights of all Englishmen."²⁴

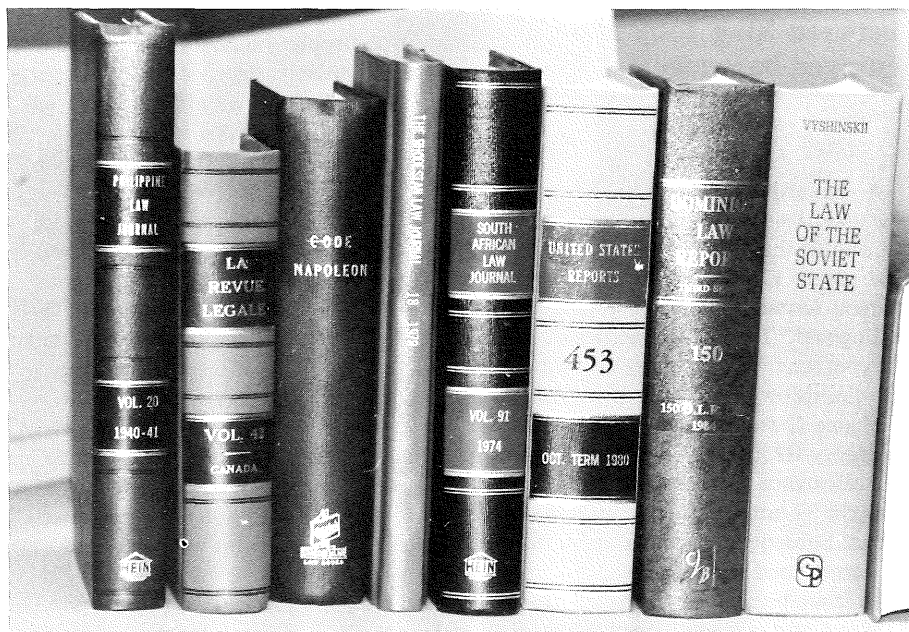
Coke revived Magna Carta by frequently citing it in support of his arguments against the use of the royal prerogative. In his *Second Institute*, Coke attacked the royal prerogative and the jurisdiction of the prerogative courts which enforced them.²⁵ He said they did not conduct themselves "according to

the course of the common law."²⁶ To Coke, the law was above all men, even the King. While Chief Justice of the Court of Common Pleas, he went so far as to state his belief in his decisions. In *Calvin's Case* (1609) and in *Dr. Bonham's Case* (1610), he asserted the superiority of the common or fundamental law as embodied in Chapter 39 of Magna Carta, stating in dicta that any act of Parliament or order of the King which contravened the common law was void.²⁷ Though King James I thought a retraction was in order, Coke stood by his views.

Known not only for its vigorous arguments against royal prerogatives, Coke's *Second Institute* was heralded for its commentary on Magna Carta as well. In it, Coke attempted to explain the meaning of the phrase "law of the land" contained in Chapter 39. However, Coke's interpretation of the due process concept reflected more of his own ideas about the common law and its procedures than what Magna Carta actually mandated.²⁸ Under Coke's interpretation, indictment by grand jury and trial by jury were required in all criminal cases. A literal translation of Chapter 39 renders Coke's interpretation incorrect, but throughout the seventeenth and eighteenth centuries it was adopted by most legal thinkers as accurate.²⁹

It was upon these theories that Coke would subsequently base his arguments in the *Petition of Right*. In 1628, Parliament and King Charles I had reached an impasse over a reaffirmation of Magna Carta containing certain additions which the king would not assent to.³⁰ The additions were designed to put an end to the recent executions and imprisonments ordered by the irresponsible Stuart monarch. Many of the imprisonments were the result of a refusal to pay certain forced loans to the king. One of these cases was that of the Five Knights who were jailed and sought writs of habeas corpus for their release.³¹ The writs were subsequently denied and this caused great indignation throughout England.

Finally, after much debate, the king and Parliament came to a formal agreement. Known as the *Petition of Right*, it was prepared by committee of members of the House of Commons



which was headed by Coke.³² It charged King Charles with various violations of Magna Carta as a consequence of his former course of conduct. It was the first official interpretation of Magna Carta since the time of Edward III.³³ But it was Coke's interpretation which was embodied in the Petition of Right rather than the understanding Magna Carta originally had. The Petition of Right was ultimately passed as a statute, thereby incorporating Coke's interpretation of "due process of law" into the laws of the realm.³⁴

When Coke's ideas as embodied in the Petition of Right exerted their most dramatic effect and the Stuarts had been deposed from the monarchy, the ideas and language of due process as found in Magna Carta took seed in the minds of the English colonists in America.³⁵ From the very beginning, with the granting of the first Virginia charter by James I in 1606, the English colonists in the New World claimed they were entitled to enjoy the same fundamental rights possessed by their counterparts back in the homeland.³⁶ They did not believe they had forfeited those rights merely by emigrating. They claimed:

"for Us, our Heirs, and Successors, Declare, by these Presents, that all and every the Persons, being our Subjects, which shall dwell and inhabit within every or any of the several Colonies and Plantations, and every of their children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of ENGLAND, or any other of our said Dominions."

was included in James' patent to the Virginia Company in order to provide the colonists with the constitutional guarantees they enjoyed in the homeland.³⁷ For this reason, Magna Carta was presumed to be operative in the colonies.

However, this blanket provision did not contain an express grant of the rights and privileges contained in Magna

Carta. But because they considered themselves to be English subjects and Magna Carta was the best known document of English constitutionalism, the colonists interpreted Magna Carta as applicable to their situation. They made specific references to Chapter 39 in promulgating their laws, indicating the importance they attached to the liberties granted by that section. From the settlement of Jamestown until the beginning of the American Revolution, Magna Carta's due process provision was referred to and relied on more than any other provision in support of the colonists' fundamental rights.³⁸

"... Magna Carta's due process provision was ... relied on more than any other provision in support of the colonists' fundamental rights."

Not all of the colonies began as Virginia did, with the issuance of a royal patent from the king. In the absence of a royal charter, many colonies chose to develop a codified system of written laws. Early colonial legislatures struggled with this problem. Several of them relied heavily on Magna Carta for the wording of their laws. For example, the legislature of the Massachusetts Bay Colony labored for nearly three years in an attempt to develop a code of fundamental laws similar to Magna Carta.³⁹ Two copies of Sir Edward Coke were purchased by the General Court to assist in the drafting of such legislation.⁴⁰ Finally, in 1641, the Massachusetts Body of Liberties was adopted.⁴¹ Many of its provision paraphrase sections of Magna Carta, particularly section thirty-nine, reflecting the colonists' reverence for the fundamental rights of Englishmen.⁴² Although the Scriptures were also heavily relied on, the first article of the Body of Liberties echoes the spirit of Chapter 39, declaring:

"No mans life shall be taken away, no mans honour or good name shall be stayned, no mans person shall be arested, restrayned, banished, dismembred, nor any wayes punished, no man shall be deprived of his wife and children, no mans goods

or estaite shall be taken away from him, nor any way indammaged under Coulour of law, or Countenance of Authoritie, unlesse it be by vertue or equitie of some expresse law of the Country warranting the same, established by a general Court and sufficiently published or in case of the defect of a law in any particular case by the word of god. And in all Capitall cases, or in cases concerning dismembering or banishment, according to that word to be judged by the General Court."

However, some colonists were not secure with the constitutional guarantees of the Body of Liberties and petitioned the General Court for the establishment of liberties like those enjoyed by all Englishmen. The colonists felt that additional codification was necessary to insure regularity in the administration of justice.⁴⁴ The General Court responded to these demands by stating that "civil liberties in Massachusetts under the Body of Liberties were as well protected as those in England under Magna Carta and the Common Law."⁴⁵ They buttressed this position by citing some nine provisions which in some form or another were incorporated into the Body of Liberties.⁴⁶

The popularity of the due process provision of the Body of Liberties is reflected in the cases of Connecticut and Rhode Island. In its enactment of a law of fundamental rights and liberties (1650), Connecticut copied the due process provision almost verbatim of that of Massachusetts Body of Liberties.⁴⁷ Likewise, Rhode Island adopted a similar code of laws in 1647 which inferred that statutes made by its General Assembly were the law of the land.⁴⁸

In 1638, the colonial assembly of Maryland enacted a statute expressly incorporating Magna Carta into its fundamental laws.⁴⁹ However, the act was vetoed by the king because of the possible obstacles it could present to the use of the royal prerogative in the colony.⁵⁰ The colonial assembly continually passed legislation embodying what they considered the epitome of the privileges of Englishmen, Chapter 39 of Magna Carta, but these acts were consistently disallowed. This did not stop the colonists from claiming entitlement to the benefits of English law.

Later charters such as the New York Charter of Liberties and the Pennsylvania code, both enacted in 1683, reflected a desire on the part of colonial assemblies for the more exact wording of Magna Carta. The colonists claimed that since they were English subjects, they were entitled to all the protections afforded free Englishmen as embodied in Chapter 39 of Magna Carta. In section thirteen, the New York law provided:

"No free man shall be taken and imprisoned or be disseized of his freehold or liberty or in any other way destroyed but by the lawful judgement of his peers and by the law of this province."⁵¹

Similarly chapter sixty-four of the Pennsylvania statute provided:

"That no Freeman within this province of Pennsylvania or Territories thereof, shall be taken or imprisoned of Dispossessed of his freeholds, or liberties, or be Outlawed, or Exiled, or any otherwise hurt, Damnfied, or Destroyed, nor shall hee be tryed or Condemned but by the lawful judgement of his equals, or by the laws of this Province and Territories thereof."⁵²

Both of these clauses closely resembled the due process provision of the enactments of the House of Commons in 1354 and 1363, during the reign of Edward III. However, both were subsequently disallowed, much to the disappointment of the colonists.

It is of interest to recount the somewhat stormy history of the Pennsylvania legislature and how it came to enact this statute which so closely paraphrases Chapter 39 of Magna Carta. Pennsylvania was founded by William Penn, a religious nonconformist, and it was granted to Penn by Charles II in 1681, in lieu of his monetary claim upon it.⁵³ Unlike many proprietors of the English colonies in America, Penn took a deep interest in his colony, taking great pains to insure political and religious freedom there. It was the harsh lesson of his own experience which devoted him to this mission.

In 1670, Penn and a friend, William Mead, were brought to trial in England for tumultuous assembly after a meeting of the Society of Friends to whom Penn was preaching Quaker doctrine.⁵⁴ Penn defended himself at his trial, and

although he claimed no formal legal training, he quoted Coke's interpretation of Magna Carta the common law in support of his defense that he was acting within his rights.⁵⁵ Citing the *Second Institute*, he addressed the court, stating, "Lord Coke...tells us, That Common Law is common right, and that Common Right is the Great Charter-Privileges."⁵⁶ He went on to cite Chapter 39 of Magna Carta. Penn and Mead were eventually found not guilty and they maintained their rights and privileges were guaranteed under Magna Carta.⁵⁷

It is no wonder then that Penn was so conscious of the importance of Magna Carta when he undertook to draft a body of laws for his colony. As noted above, the Pennsylvania code was adopted in 1683. In it, Penn and members of the Pennsylvania legislature purposely incorporated several provisions taken directly from Magna Carta. Penn saw in Magna Carta a model upon which the legal system of his colony would be based.

Coke had a profound impact on men like Penn who believed in fundamental rights. In 1687, Penn published in Philadelphia a commentary on Magna Carta entitled *The Excellent Privilege of Liberty & Property; Being the Birth-Right of the Free Born Subjects of England*.⁵⁸ Part of the book was a copy of the 1225 version of Magna Carta, its first publication in America.⁵⁹ Penn included it in his book so that his colonists would know what their rights and privileges were. The commentary reflected a number of years of unspoken reliance on Coke's interpretation of Magna Carta.⁶⁰

In 1693, the code adopted in 1683 was disallowed by William and Mary.⁶¹ Penn and his legislators then renewed their efforts to provide the colony with a set of laws embodying Magna Carta. In 1699, while visiting his colony, Penn encouraged the colonists to voice their opinions about various proposals for new code of laws.⁶² Finally, after two decades of debate, the Charter of Privileges was passed in 1701.⁶³ The Pennsylvania charter went beyond the guarantees of Magna Carta. It included additional rights such as the right to counsel and the right of a defendant to summons witnesses in criminal cases.⁶⁴ The charter

did not fail to include Magna Carta's due process of law language which was reiterated as "the ordinary course of justice."⁶⁵ It would remain in effect until the outbreak of the American Revolution.

In 1712 the colonial legislature of South Carolina enacted a body of laws incorporating a number of English statutes as applicable to colonial conditions.⁶⁶ Included were Magna Carta and an adoption of the English common law and other statutes which protected the rights and privileges of English subjects.⁶⁷ The colonial legislature of North Carolina followed suit and adopted a similar body of laws in 1715.⁶⁸ By this time virtually every colony had drafted its own statement of fundamental liberties, relying heavily on Magna Carta's Chapter 39 which men like William Penn heartily endorsed.

During the period prior to the American Revolution, it was the elements of procedural due process which were of greatest importance to the colonists. As a result, Parliamentary acts such as the Navigation Acts of 1660 and 1696 and the Molasses Act of 1733 did not bother the colonists because their personal liberties and the autonomy of their local courts and legislatures were not affected.⁶⁹ However, this would all change when the colonists were rudely awakened to the realities of the Stamp Act of 1765. It signified Parliament's absolute refusal to recognize their rights as English subjects.⁷⁰

The Stamp Act was an internal tax levied by Parliament on all the colonies. The Americans saw it as the fatal blow to the rights they enjoyed as Englishmen. Magna Carta was invoked as a general prohibition against such arbitrary exercises of governmental power, but more particularly, as a bar to arbitrary taxation.⁷¹ The colonists claimed the power to levy taxes upon them was within the jurisdiction of their respective colonial legislatures, not Parliament. They based this claim on the law of the land provision of Magna Carta.⁷² The line of argument against the Stamp Act would ultimately form the basis of their decision to break away from the homeland, England.

Colonial spokesmen such as John Adams of Massachusetts and Patrick Henry of Virginia criticized the Stamp

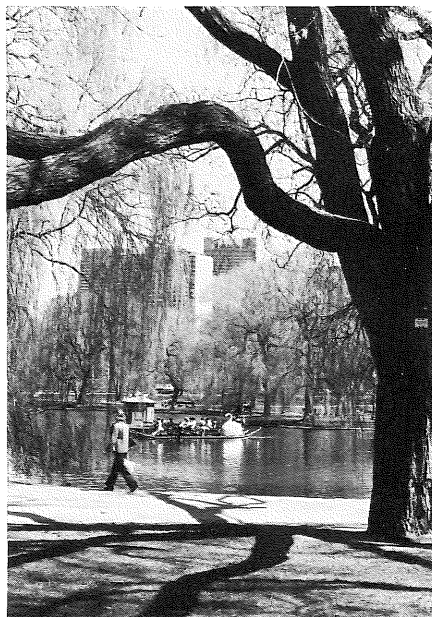
Act as unconstitutional and violative of Magna Carta. Each asserted in his own work that such taxation without representation in Parliament was a fundamental principle of the English constitution.⁷³ Adams stated in his *Instructions of the Town Braintree* that said acts were “directly repugnant to the Great Charter itself.”⁷⁴ Patrick Henry expressed similar beliefs in the Stamp Act Resolves he proposed to the Virginia House of Burgesses.⁷⁵ In addition, Henry cited the first clause of the Petition of Right (1628) in defense of his arguments against the Stamp Act.⁷⁶ The fundamental mistake the colonists made was that they thought that Parliament would repeal the Stamp Act once the discrepancies between it and Magna Carta were pointed out to them. Such was not the case.

As a result, the Stamp Act Congress was convened in the fall of 1765.⁷⁷ They reiterated the views previously expressed by Adams and Henry and adopted them in their resolutions and petitions addressed to the king.⁷⁸ They addressed the issues of local control of taxation and the right of a trial of a jury of one's peers. The Congress held that these were inherent rights of Englishmen, whether living in the colonies or in England, and as such, were protected by Magna Carta.⁷⁹

The Stamp Act was not repealed and the debate over its constitutionality mounted. This led to the imposition of the “intolerable acts.” (As a result, the port of Boston was closed in retaliation for the Tea Party incident). Hostility was mounting on both sides of the Atlantic and war seemed inevitable. It was under these conditions that the first Continental Congress was convened in Philadelphia in 1774.⁸⁰ The Congress drafted and issued a declaration in language reminiscent of the English Bill of Rights.⁸¹ It stated that “as Englishmen their ancestors in like cases have usually done, for asserting and vindicating their rights and liberties.”⁸² The resolves contained in the declaration reiterated the fundamental colonial idea that their original charters guaranteed them the freedoms and privileges of English subjects, including the common law and the fundamental guarantees of Magna Carta.⁸³

The Second Continental Congress met the following year. The situation with England had worsened. Reconciliation with the motherland was no longer possible. The colonists felt that the crown had deserted them in the New World and that, therefore they need no longer remain loyal to England.

After having spent more than a year in legislative session, the Second Continental Congress drew up the Declaration of Independence at Philadelphia in 1776.⁸⁴ Thomas Jefferson, author of the declaration, reiterated many of the same grievances contained in the Petition of Right such as the quartering of troops without legislative consent, arbitrary taxation, illegal prosecutions, the abdication of government in the colonies, and for waging war by the king on his subjects.⁸⁵ For all of these offenses and for “taking away our Charters, abolishing our most valuable laws, and altering fundamentally the Forms of our Government,” the “Free and Independent States...[would be] Absolved from all allegiance to the British Crown.”⁸⁶



The Revolutionary War ensued and the Americans were victorious. They now were faced with the challenge of turning the negative grievances of the Declaration of Independence into positive rights. Each colony approached this task in a different manner.

When the colonists had successfully thrown off the yoke of English rule, several colonies drew up bills of rights to replace their forfeited colonial charters. Magna Carta's thirty-ninth section would become incorporated in nine of the thirty new states' constitutions.⁸⁷ The first constitution of an independent American state was that of Virginia in June, 1776.⁸⁸ The first half of the constitution was its bill of rights which addressed natural rights and criminal rights.⁸⁹ Chapter 39 of Magna Carta in an abridged form was adopted as a postscript to its due process provision. Section eight provides, “that no man be deprived of his liberty, except by the law of the land or the judgment of his peers.”⁹⁰ Thomas Jefferson, who with George Mason prepared drafts for the Virginia constitution, later refined his idea of the inherent rights of life, liberty and happiness and incorporated it into the Declaration of Independence.⁹¹

State constitutions adopted after this contained both the underlying principles and the phraseology of Magna Carta. For example, section twenty-one of the Maryland Declaration of Rights closely followed Chapter 39 of Magna Carta. It reads:

“That every freeman for any injury done him in his person or property, ought to have remedy, by the course of the law of the land, and ought to have justice and right freely without sale, freely without any denial, and speedily without delay, according to the law of the land.”⁹²

This became the model for North Carolina in drafting its constitution. However, states such as Pennsylvania and Massachusetts preferred the more exact wording of Chapter 39 as found in the reaffirmations of Henry III.⁹³ In addition, these state constitutions contained statements of unalienable rights which would be protected by the law of the land. Rhode Island solved this problem by retaining its colonial charter since it could point to the rights and liberties

of Englishmen language which would make Magna Carta applicable.⁹⁴

The Federal Constitution, as originally adopted in 1789, contained no provision guaranteeing due process of law to its citizens. As a result, the Constitution was severely criticized by the people as dangerous to the preservation of their rights. But the Articles of Confederation had failed and the newly independent country was in desperate need of a centralized system of government. This was the purpose of the Constitution. However, past experience had taught the colonists that their rights could not be taken for granted, so they wanted some assurances.

In response to this pressure, Congress drafted ten amendments to the newly adopted constitution which were ratified by 1791.⁹⁵ Known as the Bill of Rights, these amendments secured the rights and liberties of the individual citizens and the separate states against any encroachments on their freedom by the federal government.⁹⁶ These amendments did not affect the powers of the states regarding their own citizens but limited the power of the federal government. However, the fears of the generation who had taken part in the Revolution subsided dramatically after the adoption of the Bill of Rights.

Of all the amendments in the Bill of Rights, the Fifth Amendment is the only one of the first ten amendments which contains a due process provision reminiscent of Magna Carta. It also includes the first use of the phrase "due process of law" in an American constitution.⁹⁷ It reads:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."⁹⁸

The use of the phrase "due process of law" was innovative for the time, since all the former Declarations of Rights of the colonial and revolutionary periods had used Magna Carta's "law of the land" language. However, the wording of the Fifth Amendment prevailed and was used in most subsequent state constitutions.

"Magna Carta's due process of law concept . . . has given our country infinite durability."

A final observation regarding the due process provision of the Fifth Amendment concerns its location in the Bill of Rights. It has no place of distinction but merely seems to be a general clause, like those which precede and follow it. But Magna Carta's contribution of the due process provision in the Federal Constitution and other state constitutions becomes more significant in view of later developments in American history leading to the passage of the Fourteenth Amendment. Magna Carta's due process of law concept has provided our system of government with a benchmark against which all legal disputes must be resolved. It has given our country infinite durability...

Endnotes

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- 2) Rodney L. Mott, *Due Process of Law*, (New York: Da Capo Press, 1973), p. 3.
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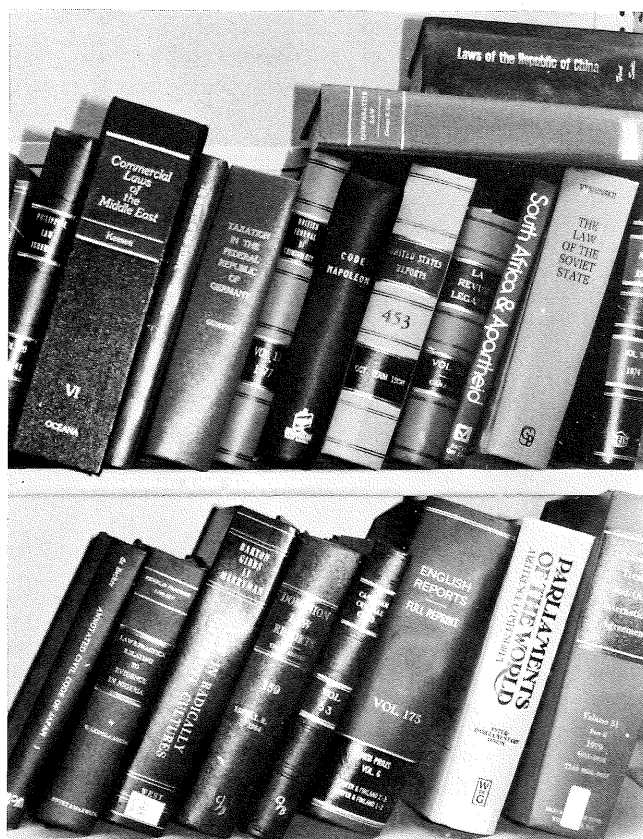
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 95) Hazeltine, "Influence of Magna Carta," p. 26.
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The Defense Attorney in the Soviet Union

by Jeffrey A. Cohen

Jeffrey A. Cohen, a second year student at Suffolk University Law School wrote the following for Professor Hicks' Comparative Law Class.

Introduction

What is the role of the criminal defense attorney in the Soviet Union? Is he a stooge of the state, or is he an aggressive advocate, zealously fighting for the rights of his client? Does he have freedom from state interference so that he can conduct an adequate defense, or does the government intervene and prevent competent representation? Is the advocate a defense attorney in the Western sense, or is he merely another Russian bureaucrat assisting in the orderly disposal of criminal matters? This paper will attempt to answer these questions by discussing the Soviet criminal process, the history of the Soviet bar, and the respective roles of the advocate, prosecutor and judge in the Soviet Union.

The Soviet criminal process is modeled after the criminal system developed in continental European countries. The case is initiated, an inquiry or preliminary investigation is made into the case by the investigatory agencies. At this point the investigatory agency gathers evidence both *for* and against the accused. The pretrial investigatory stage is the critical stage in the Soviet system as conclusion to indict is much more determinative of the eventual outcome, than say a United States Grand Jury indictment. The decision on whether or not to indict is made by the procuracy (roughly equivalent to U.S. prosecutors, but much more powerful, and encompassing more roles in the judicial systems), based on evidence gathered against the accused by interrogating experts, from witnesses, and the accused. Additionally, evidence is obtained by investigators traveling to the scene of the crime, searches and seizures

are made, and examining of witnesses are conducted.

The Soviets divide preliminary investigations into two categories, inquiries and preliminary investigations. There is no right to counsel in an inquiry. Many less serious crimes proceed directly from the inquiry stage to trial. Thus, there is no right to pretrial counsel for many crimes in the Soviet Union. In a more serious offense, there is a statutory right to pretrial investigation which is basically similar to an inquiry. One difference is that there is a limited right to pretrial counsel in a preliminary investigation.²

At trial all defendants have a right to counsel. The trial consists of the evidence gathered during the pre-trial inquiry and preliminary investigation, plus a judicial review concerning the reasons for indictment. Any additional evidence gathered since the indictment, is also reviewed. The trial is conducted by one judge and two people assessors. The people's assessors, or lay judges, are laymen elected for a two year term. The lay assessors are in some ways analogous to a jury, but unlike a jury, they decide issues of fact and law. The lay assessors have equal voting rights, with the judge, thus in theory they could overrule the judge's ruling, though in practice this rarely occurs since the judge instructs the lay assessors on the law, and is present when the vote is taken concerning guilt or innocence. After the trial is concluded both sides have the opportunity for cassation, which is an appellate review of both facts and law. Additionally, there is a right to supervisory review which is an appellate review of the law after the judgement has legal effect. One major difference between the Soviet legal system and American courts, is that in the Soviet Union the judge plays an active role in the proceedings, often intervening to elicit testimony at trial.³

History of Soviet Attorneys (A) *Advokatura*

Though the institution of professional legal representation had appeared in Western culture as early as the 12th. Century in church courts,⁴ the Russian

bar, or *advokatura*, was not introduced until the Judicial Reform of Alexander II was proclaimed on November 20, 1864.⁵ Prior to this, the Soviet system still retained features instituted by the "reforms" of Peter the Great and Catherine II, which included a court system of maze-like complexity, replete with secret inquisitorial procedure utilizing the doctrine of "formal evidence".⁶ Prior to 1864, the judiciary was completely dependent on the judiciary.⁷ The 1864 reforms simplified the judicial system, separating the judiciary from other branches of the government, instituting the concept of a jury in a criminal trial while abolishing the previous inquisitorial procedure.⁸ The *advokatura* would admit only lawyers who had studied law for a five year period. Soon, the *advokatura* flourished and the Russian bar between the period of 1864-1917 became internationally renown for its brilliance, integrity and skill. The *advokatura* was especially noted for skillful and courageous defense of persons charged with political and ideological offenses.⁹

Immediately after the Revolution, the Russian Imperial Bar was abolished, as were the entire judicial structure of the Russian Empire.¹⁰ The initial revolutionary decree discussions, judicial administration acknowledged that persons charged with the commissions of crimes would need legal representation, however, the revolutionary decree provided that any citizen of either sex and of good character could function as defense counsel.¹¹ Though the intent of this decree was to eliminate all members of the imperial bar from the legal profession, many former attorneys continued to function as defense counsel.¹² However, by 1918 the Soviets recognized the need for a professional bar. Only relatives and members of a professional organization could represent a defendant without being compensated.¹³ Additionally, only persons elected to the "colleges of persons dedicated to advocacy" could receive compensations for their services.¹⁴ Counsel received the fee, however he then turned the fee over to the college to further educate its

members.¹⁵ The District and Province Executive Committees controlled the bar, and paid the advocates a salary. The concept of a "salaried" bar was the first admission by the Soviets that the law would not "wither away and disappear in a classless society." Marx and Engels believed that law was the instrument which the ruling class used to maintain power. With the socialistic triumph, a classless society would emerge and without class strife, the law, a tool of oppression, would vanish.¹⁶ This did not prove to be the case.

In 1920 the Soviet government became dissatisfied with the state of the bar, and substituted a rotating defense system, much like jury duty, where all laymen took time off from their regular employment to act as defense counsel.¹⁷ Thus, defendants were usually represented by persons without legal experience.

The period from 1922-1928 marked the introduction of the New Economic Policy. During this period, the Soviet Union rebuilt its war torn economy. The government introduced a judiciary act and several codes based on codes of civil law appeared. The government, attempting to stabilize the nation, enacted codes regulating civil and criminal substantive and procedural law.¹⁸

The *advokatura* was reborn and organized into "colleges of defenders".¹⁹ This period was an interesting period in Soviet history, because government allowed private enterprise in many areas of trade and agriculture.²⁰

In the 1930's the Soviet "mixed" economy ended and the Soviets installed a new "socialist" economy. The *advokatura* remained untouched until following the 1936 all union constitution. In 1939 the statute of the *advokatura* was passed.²¹ During the Stalinist era, the structure of the *advokatura* remained fairly stable. In 1958, the all-union principles of criminal procedure were passed. Then in the early 1960's, control of the Soviet bar was shifted from the Soviet federal government to the Soviet republic governments.

The college of advocates which administers the *advokatura* is a semi autonomous institution which is subject to the supervision of the Soviet *judicial* commission and the Soviet counsel of ministers.²² The college of advocates or either administrative authority can expel an advocate "for demonstrated unsuitability in the performance of his duties, systematic violation of the college's internal regulations, misconduct which brings discredit upon the calling

of an advocate, and the commission of a crime."²³ Additionally, the authorities have the right to exclude an advocate from admission to the college for up to one month after the date that they are notified of his acceptance.²⁴

Since the 1922 revival of the *advokatura*, there has been a continuing trend towards more stringent educational and professional requirements for admission to the college of the advocates if he had two years of legal practice or legal training.²⁵ Following the 1939 statute only persons with four years of legal training, or two years of academic training, plus one year of practical experience, or three years of practical experience as a judge, procurator, investigator, or jurisconsult could obtain admission to the bar.²⁶ In 1962, the standards were raised once again as only Soviet citizens who had a legal work experience could be admitted. If one met the educational requirement but did not possess an adequate legal work background, one could gain admission as a candidate for the college on a six month probationary basis.

A majority of the members of the *advokatura* are members of the communist party and many have been elected to local Soviets and in 1967 over 90 advocates were elected to preside over peoples and regional courts.²⁷

In 1939 the Soviet Union abolished private practice. The advocate does not receive a fee, however he must be appointed to a case. The accused person goes to a consultation office in order to secure the services of a defense attorney. The accused may request a particular attorney, but unless this attorney is free to accept an assignment, he must accept the attorney which is assigned to him. Fees are generally low, however it is not unusual for an attorney to receive an "under the table" payment in order to induce an extra effort. Though this action is a breach of law and of legal ethics, and can lead to disbarment, the practice continues. Some observers believe the fee schedule coupled with the ethical abuses, produces a distrust in Soviet society of the *advokatura*. In 1964 a writer in *Izvestia* stated, "the defender is still frequently regarded with prejudice. And sometimes it must be admitted, he is simply tolerated in deference to the law." To a substantial



degree, this all happens because the advokatura is organized according to a system of pay and working conditions that clearly contradict our way of life.²⁸

(B) *The Procurator*

The most important feature of the Soviet legal system is procuracy. The procuracy is analogous in American terms to a combination of the local district attorney office, FBI service and detective force rolled into one. The procuracy conducts all prosecutions in the Soviet Union and is responsible for the investigation of the more serious crimes and the preparation of indictments for these crimes. Furthermore, the procuracy has the task of "general supervision", or the investigation of all unlawful acts of state officials. Curiously, this includes the investigation of all erroneous decisions by judges who are at least theoretically, the superiors of the procuracy. The procuracy's job is to ensure that the rules, laws and regulations of Soviet central authority are enforced at the intermediate and lower level of society. Additionally, by utilizing their power of indictment and prosecution, the procuracy maintains social order and quells any social protest.

In addition to the procuracy's criminal duties, each year the procuracy investigates thousands of citizen complaints concerning bureaucratic abuse. Soviet law requires that the procuracy respond to every complaint and that it then present each complaint to the proper agency for consideration. If the procuracy dislikes a decision of a Soviet lower court, it will appeal the decision to a higher court.

During Stalin's reign, the procuracy lost a substantial portion of their power. Agencies of state security usurped the procuracy's supervisory power over the labor camps and assumed the procuracy's role in investigating "counter-revolutionary crimes". However, following Stalin's death in 1953, the procuracy returned to their former role. The Procurator General of the U.S.S.R. was placed in charge of K.G.B. investigations.²⁹ In 1955 the procuracy was given supervisory power over the labor camps, including the power to make frequent inspections to correct illegal practices.

The power and importance of the procuracy is epitomized by the seven year tenure of the Procurator General of the U.S.S.R. on the supreme Soviet. This tenure is longer than the tenure of members of the Soviet Supreme Court! Additionally, the Procurator General confirms the appointment of *all* subordinate procurators throughout the Soviet Union.³⁰

(C) *The Dilemma of the Russian Advocate*

While the role of the procuracy is easily defined, the advocate in the Soviet Union is often confronted with a moral dilemma. On the one hand, he has a duty to make strong defense for his clients. The 1962 statute on the advokatura defines the duty as follows: "(an advocate) is to serve the state by helping to strengthen socialist legality, (on the other hand he should) make use of all ways and means recognized by law in defense of the rights and legal interests of citizens who seek his legal assistance."³¹ The advocate is theoretically supposed to serve as an "aide to the court". He should assist the court in criminal proceedings where the court's function is "to secure the correct application of the law so that every person who commits a crime shall be subjected to a just punishment, and not a single innocent person shall be criminally prosecuted or convicted."³² Obviously, this is a marked contrast from the American judicial system which holds that justice is best obtained through an adversary process, where defense counsel zealously defends his client's rights.³³

Another problem the advokatura faces, in addition to deciding whether to assist the state in obtaining the truth, or whether to function as a traditional defense counsel, is that the advokatura often must face interference by the judge and procurator. Theoretically the advokatura is independent of the court by virtue of his membership in the college of advocates. In reality, if the procuracy believes an advokatura is conducting too vigilant a defense for clients, the procuracy will sanction the advokatura. In one case the procuracy sent a letter to the college of advocates accusing three defense attorneys of protecting "known criminals". In another instance, the court objected to the conduct of an at-

torney who defended a man, ultimately convicted by the court.³⁵

In these instances, the college of advocates serves as an intermediary between the procuracy and the advokatura. The college will conduct an investigation to determine if the advocate violated a Soviet law in his defense. If the charges are unfounded, (as they were in the two mentioned instances) the advocate's name is cleared. If the advocate has violated the rules of the college, by showing "negligent or bad faith attitude toward the fulfillment of his duties" or committed "other acts which bring discredit on the calling of the advocate", the offending advocate may be subject to disciplinary procedures.³⁶ Penalties for wayward advocates include "reproof", "reprimand", "severe reprimand", or "expulsion".³⁷ Additionally, the college of advocates has little power in protecting its members once the state has determined that an advocate has violated state regulations. Thus, a prudent advocate must tread carefully in his courtroom conduct or else he may soon be looking for a new line of work. Additionally, this places the defendant in a very precarious position. The state has conducted a thorough and detailed investigation and determined that he is guilty. If his defense counsel decides he is guilty, his counsel will assist in "ascertaining the truth" and actively take part in his conviction. If the defendant manages to convince his counsel he is indeed innocent, counsel still cannot conduct a vehement defense without fear that he may be subject to sanctions or perhaps expulsion from the Soviet Bar. It is clear that the role of a defendant in the Soviet legal system is not an enviable one.

"... Counsel cannot conduct a vehement defense without fear that he may be subject to sanctions ..."

Recently there has been some reformist thought concerning the role of defense counsel in the Soviet system. The traditional line of thinking was represented by M. Chel'tsov, a Stalinist era legal philosopher who believed that "counsel has a duty to reveal the facts of the case to court even if they are

detrimental to his client's position."³⁸

More recently Ul'ianova, a female Soviet advocate, has proposed a more moderate school of thought. Ul'ianova sees counsel as an independent figure, independent of both the court and her client.³⁹ Counsel should take his client's request into consideration, but should not be bound by them, rather he should be "subordinate only to the law and his own conscience". Ul'ianova sees counsel neither as a servant nor slave of the accused, nor a machine for the defense programmed by the state. Counsel should have independent procedural rights and thus be free to choose his own methods of defense.

Ul'ianova attempts to reconcile the advocates dual responsibility by placing the advocate in a position of independence from both the state and the client. While Ul'ianova suggests that counsel should utilize all legal means in the defense of an innocent client, counsel still does not have the right to "use legal methods in defense of a client's illegal interests".⁴⁰ This statement indicates that Ul'ianova still partially adheres to Chel'tsov's earlier theory that counsel should actually prejudge a case, and that he should seek an acquittal only if he is convinced of his client's innocence. Ul'ianova differs from Chel'tsov in that while Chel'tsov would admit the guilt of a client, he prejudged as guilty, Ul'ianova would remain silent and simply confine her remarks to a discussion of the mitigating circumstances. To this author this is at best a *subtle* change of position, but it does represent a degree of reformist thinking among Soviet defense counsel.

Conclusion

While the role of a procurator is powerful and prestigious, the advocate position is much more precarious. While the advocate does not have to face the dilemma an American defense attorney in representing "guilty" clients, he is given the awesome responsibility of essentially prejudging his client. This client may distrust the advocate since the client has to pay him a fee and since he knows the advocate may assist in his conviction. Additionally, the advocate must walk a tight rope above interference from the procuracy, judges and sentencing his own college of advocates.

Still, though the odds may be stacked against the defendant and the advocate, there is a *semblance* of justice in the Soviet Union.

Footnotes

- 1) 1968 Wisc. C. Rev. 806, 841 (1968)
- 2) *Id.*
- 3) *See Generally* Hazarb, Soviet Criminal Procedure 15 Tul. L. Rev. 220 (1941)
- 4) *See* 82 Harv. L. Rev. 1, 12 (1968)
- 5) *See* S. Kuchero, S. A.J.C.C. 443 (1956)
- 6) *Id.*
- 7) *Id.*
- 8) *Id.*
- 9) *See* S. Kucheriv, Courts Lawyers Awb. Trials under the Last Three Tsars 212-268 (1957)
- 10) Decree of Dec. 5 (Nov. 22) 1917 arts 1,3 (1967) 4 S.U.R.S.F.K. item 50.
- 11) *Id.*

- 12) *See* Friedman Q. Zole *Soviet Legal Profession: Recent Developments in Law and Practice* 1964 Wisc. L. Rev. 32, 33
- 13) *See supra* note 1 at 813
- 14) *Id.*
- 15) *See* Kuchero, *supra* note 5 at 454
- 16) Razi, *Legal Education and the Role of the Lawyer in the Soviet Union and the countries of Eastern Europe* 48 Cal. L. Rev. 776, 784 (1960)
- 17) *Id.*
- 18) *See supra* note 1 at 814
- 19) R.S.F.S.R. 1923 Crim. Pro. C. Degree of May 25, 1922
- 20) *See supra* note 1 at 814
- 21) *See supra* note 1 at 814
- 22) Law of July 25, 1962, art 5, C. 1962 15-16 Sov. Just 31 (Supreme Soviet U.S.S.R.)
- 23) *Id.* at art 13
- 24) *Id.* at art 14
- 25) *See Hazard Law Practice in Russia: The Organized Bar in the U.S.S.R.* 35 A.B.A.J. 177 at 180 (1949)
- 26) *Id.*
- 27) *See supra* note 1 at 817
- 28) Quoted from Itzuetsia April 8, 1964 at P3 Col. 6. *See also* Barri and Berman, the Soviet Cejil Profession 82 Harvard L. Rev. 1, 16 (1969)
- 29) *See supra* note 1 at 25
- 30) *Id.*
- 31) Law of July 25, 1962 art 31 (1962) (J-1c Sov. Input 31. [Supreme Soviet U.S.S.R.]
- 32) U.S.S.R. 1958 Principles of criminal procedure art 2 R.S.F.R. 1966.
- 33) *See generally*, code of Professional Responsibility canon 7
- 34) *See supra* note 1 at 823
- 35) *Id.*
- 36) Law of July 25, 1962 art 40 [1962] 5-16 Sov. Just (Supreme Soviet U.S.S.R.)
- 37) *Id.*
- 38) M. Chel 'Sov Advocate in the Soviet Process 53 (1954)
- 39) Ul'ianahoun, (oh the procedural status of the advocate and his position in a case) 3 sos Zat 6 0 ?
- 40) *Id.* at 60

Bail in England and America

by Nancy Waggner

Nancy Waggner is a third year student at Suffolk University Law School, she wrote this piece for her Comparative Legal Systems course with Professor Hicks.

Introduction

Because of our shared traditions in language, law and culture, the English and Americans have long considered themselves cousins. Differences exist in the two societies, however. One area of difference is crime and criminal procedure. This paper examines the history and use of bail in England and America.

In very broad terms, after people are arrested in either country, they are arraigned before a judge or magistrate to:

- be advised of the charges against them
- enter a plea of guilty or not guilty
- be assigned counsel (if they are found indigent)
- have a date set for trial or pretrial hearing, and
- most important to defendants, have bail set.

Bail is generally an amount of money set by the judge or magistrate, but can also be a defendant's promise to return (known as personal recognizance or own recognizance) or the promise of a third party to see that the defendant returns to court for trial.

The main purpose of bail is to insure the defendant's appearance at trial. It is widely believed, however, that in addition to the defendant's chances of fleeing, courts take into account the safety of witnesses and the general community when making bail determinations. This is a difficult area of criminal procedure in both England and America because it often results in pretrial incarceration (which may be from a few weeks to a year) of people who have not been — and may never be convicted of a crime.

England

The exact historic origin of bail is not known. Three theories have been developed to explain it.¹ The first theory is that bail grew out of the practice of wergeld, a custom that if one person killed or seriously injured another, an amount of money would be paid (depending upon the victim's social rank) rather than have the matter settled by blood feud. A contract, made up of three stages, obligated the accused to pay a wergeld. An intermediary (or surety) would approach the victim's family to assure them that payments would be made. The family then produced a surety of their own to provide for the accused's safety in coming forward. The final surety was then presented by the accused to the victim's family to insure payment of the wergeld. This obligation was symbolized by a wed, something of little value such as a stick.

This acknowledged the debt before the surety and permitted the accused to be free upon the condition that the wergeld was paid. The symbolic wed was then given by the family to the same surety, which recognized the surety as trustee of the debt and relinquished the family's right to use force against the debtor. The surety was therefore responsible for having the accused/debtor make wergeld payments. There is no mention in the literature of the surety receiving compensation for these services, and generally family or clan members performed this function for each other.²

A second theory on the origin of bail comes from the military use of hostages in Germany.³ Hostageship, the responsibility of one person for another, entailed the actual seizure of the person. A third party would be held for the debt of another, such as a son being held for a debt of his father. This is refuted by the final theory that a surety made the debtor responsible to him in return for protection.⁴ The surety had control over the debtor and his property.⁵ Property would be attached first and the debtor maintained his conditional freedom so long as he had sufficient property to

pledge.

As history developed and kinship ties loosened, custom first permitted friends to stand as surety, and then larger groups.⁶ By the 10th century A.D., every freeman over twelve years was to have a surety in an informal law enforcement system to insure that everyone performed his legal duties.⁷

After the Norman Conquest of Britain (1067) the wergeld contracts were gradually replaced by trial by combat, which also required sureties. If the surety was unable to produce the man for whom he had pledged, he was subject to a tariff.⁸

The final stage in the development of the surety relationship was frankpledge. This was not a voluntary surety relationship, but a compulsory, mutual, reciprocal and collective one (generally in groups of ten). The members of the frankpledge were responsible for bringing to the authorities anyone in the group who committed a crime. There is debate whether or not the frankpledge was answerable beyond the initial bringing forth of the accused which would require the group to actually produce him at trial.⁹

The history of bail is so cloudy up until this point because the administration of justice was a private matter. With the issuance of the Assize of Clarendon of 1166, the Crown began to take control of certain criminal matters, making them public rather than private disputes. This law required a procedure of indictment by a presenting jury (the predecessor to the grand jury) for the crimes of robbery, murder and theft. This allowed the accused to stand before a more disinterested third party.¹⁰ From that point on, records began to be kept for those classes of offenses.

Following the Assize of Clarendon, sheriffs had virtually unrestricted authority and responsibility for acting as custodian of those accused of crimes.¹¹ It is believed that bail was (except in homicide cases) freely granted, largely because of the inconvenience of incarceration and the often great length of time between arrest and the arrival of

the justices.¹² Because they rode circuit, it was often months, even years before justices heard cases. Furthermore, conditions of the gaols (pronounced and meaning the same as jails, a place for temporary confinement) were, by today's standards, atrocious. In addition to terrible living conditions, gaols were not very secure facilities, and escapes were frequent. As a result of these factors, it was generally a simpler matter for a sheriff to pass on the responsibility for defendants' appearance at trial to a third party surety. Whether defendants were to be released in this manner or detained in gaol was up to the sole discretion of the sheriff. This uncontrolled authority was a well answered invitation to abuse the system. Edward I (1272) appointed a commission of Hundred Jurors to investigate the entire system. They found sheriffs and other local officials demanding payment for the release of the accused and not infrequently the false arrest of the innocent who were made to buy back their freedom.¹³ As a result of these findings the Statute of Westminster of 1275 established bail practices into specific written law, and mandated which offenses were bailable and which were not. Furthermore, severe penalties were ordered for those officials who declined to serve the King's pleasure and continued extracting fees.¹⁴

The corruption in the bail system by no means disappeared after the Statute of Westminster. In 1487 a statute attempted to stop the collusive bailing of suspects by requiring the presence of at least two justices to grant bail and certification of bailment by at least one of them.¹⁵ Another statute¹⁶ was passed in the Tudor Era (1555) to assist the trial courts' review of bailment by requiring (as did the 1487 statute) two justices to grant bail.

Unlike the previous statute, however, this law required both justices to be present together at the granting of bail, and one of them had to be "of the quorum" (a member of the quarter session and deemed to be more highly qualified than a Justice of the Peace.¹⁷) More importantly, the statute required the justices to take statements from the defendant and the complaining witnesses and the sheriff, from those statements to determine that there was material to prove that a crime had been committed and to put the basis of their decision in writing. Thus for the first time, justices were held accountable for their decisions because trial court was able to review the underlying facts.

By the reign of Elizabeth (1558-1603) the bailing of defendants was considered an ancient practice.¹⁸ Recognizance was used not only to insure the defendant's appearance at trial, but also that of the

complaining witnesses. If they did not show for trial, the defendant was generally released completely, even if charged with a felony.¹⁹ A further use of bail, or recognizance, by Justices of the Peace was as crime prevention in the form of peace bonds.²⁰ If two or more people had a dispute involving violence, or the threat of it, the person in fear would go to the Justice and swear under oath that he or she was in danger. If a bond was issued by the Justice, it would name the principal (the one who supposedly made the threat) and two sureties. If the bond to keep the peace was broken, the principal or the sureties were required to pay the forfeited bail amount. To guard against misuse of the peace bond, a severe penalty for malicious prosecution was also instituted.²¹ The use of the peace bond was for prevention of crime rather than for punishment.

In 1688 the English Bill of Rights was adopted, which included a prohibition against excessive bail.²² Between that time and the criminal justice reforms of the 1960's and 70's bail could be granted in misdemeanor cases by police and magistrates. As a general rule, one accused of a felony was not entitled to bail as a matter of right.²³ The major factor to be considered when setting bail was the likelihood of defendants' appearance at trial,²⁴ but justices also took into account the nature of the charge, strength of the evidence, defendants' character and, quite significantly, the recommendations of the police.²⁵

That bail practice continued relatively unaltered for about three hundred years. Alterations were made by the Bail Act of 1976.²⁶ The major changes in the present Act are:

- it creates a general right to bail
- exceptions to that right are specifically enumerated
- personal recognizance is abolished and replaced by a duty to attend
- failure to attend is made a separate offense
- conditions, and changes in conditions, of bail are permitted
- explanations for defendants' failure to appear in court are permitted.

Prior to the Act there was no express right to bail. The Act changed that by



requiring that one who appears before a magistrate *must* be granted bail unless the case falls within one of the enumerated exceptions. There are three exceptions that apply to all charges:

- defendant has been arrested for absconding
- defendant's own protection requires no bail
- defendant is already in custody after having been sentenced for another offense.

There is an additional exception to bail in non-committable offenses:

- defendant has previously failed to answer bail *and* seems likely to do so again.

If a defendant is charged with an offense punishable by imprisonment, bail may be denied for the following additional reasons (although the decision is discretionary):

- defendant is likely to fail to surrender to custody
- defendant is likely to commit an offense or interfere with witnesses or the administration of justice
- the court has, for any practical reason, insufficient information regarding the defendant.

In making the bail determination, magistrates may consider the likelihood of defendants absconding,²⁷ the nature and seriousness of the charge,²⁸ the likelihood of sentence,²⁹ and defendants' background, both personal and criminal.³⁰ The decision to bail a defendant or not is to be made solely by the court. The police may bring to the court's attention relevant factual information but are not to make specific bail recommendations.

The use of one or more sureties — one who undertakes or is bound with defendant (as principal) to assure defendant's appearance in court — is still most common in England. The Act provides to determine a surety's suitability, a magistrate should consider his or her character, relation to the defendant, and financial resources. The objective is to find someone who is close to the defendant, of good standing in the community and interested in seeing that the defendant makes all required court appearances. Only if a suitable surety cannot be found does the court require a bail amount to be set. In England, unlike America, one may not post bail

for profit. Such a practice (bail bending) is unheard of there.

Besides instances in which an adequate surety cannot be found, the Act allows the use of cash bail only in cases where a defendant is unlikely to remain in Great Britain, or in committable cases, if necessary to prevent defendants from committing an offense of interfering with the administration of justice.³¹ The security may be given by defendants or on their behalf. In general, however, the use of cash bail is not as common in England as it is in America. The English prefer the more community-spirited practice of having friends or family be responsible for defendants, and using their influence to insure defendants' good behavior and appearance at trial.

"The English prefer the more community-spirited practice of having friends or family be responsible for defendants ..."

Issues surrounding the pretrial release or detention of criminal defendants have not been resolved by the Bail Act of 1976. A new dispute has arisen in the past few years concerning the right of defendants in custody awaiting trial to reapply for bail. The Magistrates Court Act³¹ §105 says that a defendant is not to be remanded in custody for more than eight days, and any such custody order is subject to the Bail Act. In *R. v. Nottingham Justices, ex parte Davies*,³ defendant Davies, while on bail for two other charges of property damage, was charged with rape. He had twice applied for, and been refused, bail.³³ He then made a third application before a different bench of magistrates. The clerk asked whether there were any change of circumstances surrounding defendant or his offense since the last application.³⁴ The defendant's solicitor replied there were not, but requested a full hearing on the merits. The court held that absent a showing of a change in circumstances, it would not hear a third bail application.³⁵ While the court acknowledged the provisions of the Bail Act, it held that after the first two bail applications are made

and refused, the matter becomes, absent any change of circumstances, *res judicata*, rather than a "personal intellectual conclusion by each justice."³⁶

This latest development in the evolution of the bail process has been met with sharp criticism. The decision, it is noted,³⁷ provides no real guidelines in this new truncated form of bail to determine what an appropriate "change in circumstances" would be. Instances of defendants finding a job, offering sureties, securing an address, and illness in the family have been found to be insufficient changes.³⁸ The charge is therefore leveled that *Nottingham Justices* makes a presumption against bail (at least for defendants remanded to custody) contrary to the Bail Act. Furthermore, it is argued that the decision will result in trials within trials to determine what constitutes a change in circumstances.³⁹ The final major criticism with *Nottingham Justices* is that it makes an inappropriate analogy between *res judicata* and the bail decision.⁴⁰ *Res judicata* means that litigation on a matter should come to an end because a point of law or fact has already been decided upon. Bail, on the other hand, is a prediction about future behavior. "The court does not make a finding about what the accused has done, it makes a prediction about what the accused may do..."⁴¹ To make the determination, the court must weave together fact and opinion, which is too subjective and speculative to be analogous to *res judicata*.

United States

When the English practice of requiring family or friends to act as sureties for defendants reached the New World, it underwent significant changes. Long established family ties and friendships were not as common as they had been before emigration. Many of the original settlers in America had been convicted of felonies in England and deported. The vast frontier also provided an impenetrable hideout for those who chose to flee their settlements and the courts.

Because of these factors, there developed early on in America a system of bail bonding for profit. The more personal English method of one person taking responsibility for another as surety was replaced by the commercial system of depositing money with the

courts to insure defendants appearances at trial. Those who could not afford the full amount set by the court would pay a non-refundable deposit with a bondsman who in turn would act as surety, promising the court he would pay the full bail amount if a defendant failed to appear in court. The system, which is basically an insurance scheme, is still operational today in most of America.

In 1789, the newly formed United States Congress passed the Judiciary Act.⁴² In addition to establishing a system of lower federal courts, the Act guaranteed the right to bail in non-capital offenses,⁴³ and made bail in capital cases dependent upon "the nature and circumstances of the offense, and of the evidence and usages of law."⁴⁴

Contemporaneous with the Judiciary Act was the drafting of the Bill of Rights. Effective in December, 1791, the Eighth Amendment echoed the English Bill of Rights of 1688 that "excessive bail shall not be required." The shortcoming of that admonition is its lack of specificity. Does it mean that there is a right to bail in all cases, and it shall not be excessive? Or that in the cases where it is determined there is a right to bail, the bail shall not be excessive? And what is the definition of excessive?⁴⁵ It could be said that any dollar amount that a defendant cannot meet is excessive because it results in the incarceration of someone who had not been convicted of a crime.

The concerns of indigent defendants' inability to meet a money bail, and their resulting confinement in jail, were not met with sympathy in the 1800's.⁴⁶ It was not until 1951 that the leading historical case on bail in the United States was decided. In *Stack v. Boyle*⁴⁷ each of twelve defendants had bail set at \$50,000. The Supreme Court held the bail was excessive, but more importantly, said that the only purpose of bail is to insure a defendant's appearance at trial:

From the passage of the Judiciary Act of 1789...to the present Federal Rules of Criminal Procedure...federal law has unequivocally provided that a person arrested for a non-capital offense *shall* (italics in original) be admitted to bail. This traditional right to freedom before conviction 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.⁴⁸

Following *Stack v. Boyle* there was much criticism of bail procedures, the resulting incarceration of the unconvicted poor, and the bail bonding industry.⁴⁹ One of the most constructive outgrowths of this criticism was the funding of a three year experimental pretrial release program by a New York businessman in 1961.⁵⁰

The Manhattan Bail Project was initially going to provide a revolving bail fund for indigent defendants who could not afford to post even minimal bail. The approach changed, however, to encouraging courts to release as many defendants as possible on their personal recognizance — their promise to return to court. To do this, the Project staff interviewed defendants prior to arraignment to ascertain their community ties, employment, prior criminal record, any physical or mental health problems, and any outstanding warrants. This information would then be verified by family, friends, employers and court records. Being provided with this sort of reliable information, the New York courts were better able to make appropriate release decisions. The experimental project was considered a great success by the courts and was subsequently replicated in a

number of cities.⁵¹

A few years after the initiation of the Manhattan Bail Project, Illinois took a different route to address the inequities of the bail system. Legislation was passed that permitted defendants to deposit 10% of their bail with the courts, rather than pay a bail bondsman the non-refundable 10% fee.⁵² Known as the 10% Deposit System, the Illinois scheme both returned the release decision to the judges (rather than the bondsmen) and refunded to defendants, minus a 1% administrative fee, their deposits after all court appearances were made, giving them a financial stake in the judicial process.⁵³ Contrary to the dire predictions of bondsmen, the legislation met with considerable success and is now used widely throughout the United States.

Momentum had built up in the bail reform movement, and in 1966, for the first time since the Federal Judiciary Act of 1789, the Congress addressed the issue of the right to bail. The Bail Reform Act⁵⁴ mandates a presumption in favor of release on personal recognizance. This presumption is even stronger than the English counterpart found in The Bail Act of 1976. Under

"The Bail Reform Act mandates a presumption in favor of release on personal recognizance."

the American federal Act, if the court determines that the defendant is not a suitable candidate for release on recognizance, it may release him or her on one of a number of conditions listed in the Act, ranging from the least restrictive (reporting to a court agency by telephone or in person on a periodic basis) to most restrictive (posting money bail or "any other condition of combination of conditions" the court calculates will insure the defendant's appearance at trial).

Judges are required by the Act to use the first (and therefore least restrictive) alternative possible. Included in the list is release to the custody of a third party (exactly like the English use of sureties), staying away from certain places or people, curfews and the least desirable option in the Act, posting money bond.

After passage of the federal Bail Reform Act, many states reviewed and revised their bail statutes. With help in large part from the now-defunct Law Enforcement Assistance Administration (LEAA) a large number of pretrial release programs were initiated similar to the Manhattan Bail Project to gather and verify information from defendants and make recommendations to the courts based on that information. These programs also supervise defendants while they are awaiting trial, which has been found to significantly reduce the numbers of missed court appearances.⁵⁵ Another advantage of the pretrial release programs is that they are sided with neither defense nor prosecution, but are rather a neutral fact finding arm of the court.

While the Bail Reform Act and the ensuing state actions did much to resolve many of the inequities of the rich (who could afford bail and therefore their pretrial freedom) and the poor (who could not and were therefore required to remain in jail while awaiting trial), the bail bonding industry continues in many jurisdictions to flourish. In addition to the anomaly of a private, profit motivated interest making the judicial determination of defendants' pretrial freedom or incarceration⁵⁶ there are a number of other criticisms of bondsmen:⁵⁷

- Bondsmen are not accountable to the public for their actions
- Regulation of the bail bonding industry are weakly enforced, if they

are enforced at all, providing fertile grounds for corruption.

- The release decision is taken away from the judge, where it properly belongs, and given to bondsmen
- many defendants are in jail who needn't be
- many are released who oughtn't be.

Some states have responded specifically to the problems presented by the bail bonding industry. A number have made it an economically unviable business by use of the 10% Deposit System. Most notable, however, is the Kentucky law that has actually made bail bonding for profit a criminal offense.⁵⁸

In its place, Kentucky instituted a statewide system of pretrial release, investigation and supervision services within the Administrative Office of the Courts. Trial courts are required to release defendants on personal recognizance or unsecured bail (the amount is set, but not collected from defendants unless they fail to appear in court) unless it can be shown that this will not assure their appearance at trial. Much of the impetus for the Kentucky reform came from then-Governor Julian Carroll:

"We are the only state in the United States that has outlawed bail bonding and has made it a crime to practice it. We did so because of my long understanding of the profession and of the fact that it encourages the commission of crime rather than providing any useful service whatsoever to society." — Gov. Carroll

The bail reform movement of the 1960's and '70's seems to have lost its momentum now. The change in political climate was illustrated by Chief Justice Burger's comments on bail in his 1981 address to the American Bar Association in which he urged more stringent crime control efforts, including a "return to all bail release laws the crucial element of future dangerousness."⁵⁹

"The bail reform movement of the 1960's and '70's seems to have lost its momentum now."

Two different lines of attack have developed that have slowed, if not stopped, the bail reform movement. The first is the above mentioned consideration of danger in the bail decision. This has been permitted, or is being considered, by over half the states.⁶⁰ While American society has a duty to protect its citizens from crime, there are a number of unanswered concerns about the use of defendants' potential dangerousness in the bail decision:

"[B]ail is now being used as a crime prevention tool."

- It turns the holding of *Stack v. Boyle* on its head, by interposing community safety upon the question of whether or not the defendant will appear for trial.
- The ability to predict future violent behavior is poor, at best. Courts must make their decisions without benefit of concrete guidelines or criteria.
- Rather than using bail as a mechanism to serve a judicial function, it is now being used as a crime prevention tool. Crime in America is caused by a complex combination of factors, and will not come to a stop because of a "quick fix" solution.
- It is often unclear whether the consideration of danger is for the purpose of setting appropriate pretrial conditions, or for detaining the defendant in jail to prevent possible dangerous behavior.

The other practice that signals the end of the bail reform movement is the above mentioned preventive detention — refusing certain defendants any sort of release from jail before their trial. Proponents say that the practice has long existed through the use of high money bail. The law should reflect the reality and add appropriate defendant safeguards, such as a detention hearing, heightened probable cause, docket preference and speedy trial.⁶¹ Those who believe preventive detention laws are needed feel the safety of communities requires the option. Some defendants, it is said, are simply too dangerous to have

loose on the streets. The difficult question, however, is to determine who those defendants are.

Opponents contend that preventive detention is punishment before trial and conviction. It offends the presumption of innocence. Keeping defendants incarcerated before trial has been found to inhibit adequate preparation of defense.⁶² Furthermore, there is a national dilemma of severe crowding in jails which will be worsened by the use of preventive detention. Most importantly, however, is the fear of opponents that many will be detained unnecessarily because of over broad definitions of dangerousness.

Conclusion

In terms of bail practices, both England and America seem headed in the same direction. Both countries are becoming more restrictive of defendants' rights, and more favorable to the government.

England has a substantial pretrial population of jail inmates. In 1975 it was estimated that defendants waiting for trial constituted 15 percent of the total jail population.⁶³ The traditional use of friends or family to stand as sureties, however, seems to allow most defendants their freedom before trial. The minor reliance on money bond in England results in a more equal treatment between poor and more well off defendants.

The pretrial population of America is not exactly known. The 1978 Census of Jail Inmates estimated that 40 percent of those surveyed in jail are awaiting trial.⁶⁴ It is not unlikely that much of the pretrial population is due to the use of money bail. American courts and legislatures must review the purpose of bail and decide if it is to insure appearance at trial, or for a broader crime control tool. If the latter is chosen, and considerations of danger and the use of preventive detention are adopted, money bail must be abolished. While reliance upon money bail already results in unfair disparities between the rich and poor, to add on to it the use of preventive detention would indeed be tragic. If, as signs indicate, preventive detention is adopted, it must be used only in conjunction with stringent constitutional safeguards.

"Let the jury consider their verdict," the King said for the twentieth time that day.

"No, No," said the Queen.

"Sentence first, Verdict afterwards!"

"Stuff and nonsense," said Alice loudly. "The idea of H having the sentence first!"

—Lewis Carroll

NOTES

- 1) Elsa deHaas, *Antiquities of Bail* (New York: AMS Press, 1966).
- 2) deHaas, p. 16.
- 3) Von Gierke, *Schuld und Haftung im alteren deutschen Recht*, P. 56, cited in deHaas, note 15, p.5.
- 4) "Der Ursprung der Burgschaft," *Zeitschrift der Savigny-Stiftung fur Rechtsgeschichte*, XCVII (1927), 581, 612, cited in deHaas, not 2 p.3 and pp. 6-10 generally.
- 5) deHaas, p. 8.
- 6) deHaas, p. 18.
- 7) deHaas, p. 18.
- 8) deHaas, p. 24.
- 9) deHaas, in Chapter 2, says no; it is in anticipation of bail, not actual bail. Holdsworth, in *A History of English Law*, p. 104 discussed in deHaas p. 26, says yes, the frankpledge was responsible for the accused's appearance at trial.
- 10) deHaas, p. 131.
- 11) deHaas, Chapters 3 and 4.
- 12) deHaas, p. 54.
- 13) deHaas, p. 94.
- 14) Those who were not to be bailed included those with prior convictions or escapes, defendants charged with arson or counterfeiting and those who had been excommunicated. Those who were to be released included people of "light suspicion," and those charged with petty larceny or receipt of felons (which seems to have been similar to present day aiding and abetting).



- 15) 13 Hen. VII c. 3 (1487), cited in John Langbein, *Prosecuting Crime in the Renaissance* (Cambridge, MA: Harvard University Press, 1974) p. 6.
- 16) "An Act Appointing an Order to Justices of Peace for the Bailment of Prisoners," 1 & 2 Philip and Mary c. 13 (1554-1555).
- 17) Langbein, p. 9.
- 18) "The Recognizance in Elizabethan Law Enforcement," 25 *American Journal of Legal History* 189, July, 1981, Joel Samaha, p. 190.
- 19) Samaha, p. 193.
- 20) Samaha, p. 194.
- 21) Samaha, p. 197.
- 22) David Fellman, *The Defendant's Rights Under English Law*, (Madison, WI: University of Wisconsin Press, 1966) p. 24.
- 23) Fellman, p. 22.
- 24) *R. v. Scaife* (1841) 9 Dowl. 553, 5 J.P. 406 (B.C.).
- 25) *Id.* at 25-27.
- 26) 1976 Chapter 63/46 Halsbury's Statutes (3rd Ed) 295.
- 27) "The requirements as to bail are merely to secure the attendance of the prisoner at the trial," said Lord Russell, C.J. in *R. v. Rose* (1885) All E.R. Rep. at p. 851. Compare with the American counterpart, *Stack v. Boyle*, 342 U.S. 1 (1951).
- 28) *R. v. Barronet and Allain* (1852), 17 J.P. 245. While it is an important factor, the charge itself is certainly not dispositive of the issue of bail.
- 29) *Re: Robinson* (1854), 23 LJQB 286.
- 30) cf *R. v. Vallett* (1951), 1 All E.R. 231; 117 J.P. 113.
- 31) s. 3(5).
- 32) (1980) 2 All E.R. 775, leave to appeal to the House of Lords has been refused. Hereinafter cited as *Nottingham Justices*.
- 33) It is unclear why this defendant was chosen by the Nottingham solicitors who brought the case forward to seek guidance on their rights and duties when making bail applications for their clients. Mr. Davies had a substantial criminal record and a lengthy history of defaulting on bail and committing further crimes while out on bail.
- 34) (1980) 2 All E.R. QBD p. 777.
- 35) *Id.*
- 36) *Id.* at 779.
- 37) "Bail — A Suitable Case for Treatment," *New Law Journal*, 4/29/82, pp. 409-410.
- 38) *Id.* at p. 409.
- 39) Mary Hayes, J.P., "Where Now the Right to Bail?" *Criminal Law Review*, January, 1981, pp 20-24.
- 40) *Id.*
- 41) *Id.* at p. 22.
- 42) Act of Sept. 24, 1789, 1 Stat. 73.
- 43) Keeping in mind that there were many more offenses deemed capital then.
- 44) Section 33, cited in Ronald Goldfarb, *Ransom: A Critique of the American Bail System*, (New York: Harper & Row, 1965) p. 27.
- 45) For a scholarly analysis of the meaning of the Eighth Amendment, see Caleb Foote, "The Coming Constitutional Crisis in Bail," (Part I) *University of Pennsylvania Law Review*, May 1965, pp. 959-999.
- 46) *Id.* at pp. 992-994.
- 47) 342 U.S. 1 (1951).
- 48) *Id.* at pp. 4-5.
- 49) Foote, note 45; Freed and Wald, *Bail in the United States: 1964* (Washington, DC: GPO, 1964); Goldfarb, note 44; McCarthy, David and Wahl, "The District of Columbia Bail Project: Illustration of Experimentation and a Brief for a Change," 55 (3) *Georgetown Law Journal* 218, 1965; Report of the President's Commission on Crime in the District of Columbia, (Washington, DC: GPO, 1966); Ann Rankin, "The Effect of Pretrial Detention," 39 *New York University Law Review* 641, 1964; National Conference on Bail and Criminal Justice: Proceedings and Interim Report, (Washington and New York: Vera Institute of Justice, 1965.)
- 50) For a more comprehensive description of the program, see Wayne Thomas, *Bail Reform in America* (Berkeley: University of California Press, 1976), pp. 3-10.
- 51) By 1964, programs had begun in St. Louis, Chicago, Tulsa, Washington, DC, Des Moines and Los Angeles.
- 52) Ill. Ann. Stat. ch. 38 §§ 110-115 (1963).
- 53) See generally, D.A. Henry, *Ten Percent Deposit Bail* (Washington, DC: Pretrial Services Resource Center, 1980).
- 54) 18 USC §§ 1346-1352.
- 55) Dan Welsh, "Is Pretrial Performance Affected by Supervision?," *Pretrial Services Annual Journal*, 1978, (Washington, DC: Pretrial Services Resource Center, 1978).
- 56) Bondsmen may decline to bail out a defendant for whatever reasons they choose, including racial prejudice.
- 57) See Thomas, note 50; Goldfarb, note 44; Paul Wice, *Freedom for Sale*, (Lexington, Mass: Lexington Books, 1974); Roy Flemming, *Punishment Before Trial* (New York: Longman, Inc., 1982); *Performance Standards and Goals for Pretrial Release and Diversion: Release* (Washington, DC: National Association of Pretrial Services Agencies, 1978); *Standards Relating to the Administration of Criminal Justice, Pretrial Release* (Washington, DC: American Bar Association, 1978).
- 58) KRS 431. 510-550.
- 59) Address by U.S. Supreme Court Chief Justice Warren Burger to the American Bar Association's Annual Meeting, Feb. 8, 1981.
- 60) *Typology of State Laws Which Permit the Consideration of Danger in the Pretrial Release Decision* (Washington, DC: Pretrial Services Resource Center, 1982).
- 61) See the *Standards and Goals* of the National Association of Pretrial Services Agencies, note 57, Standard VII. Inclusion of this standard was the subject of years of debate within the Association, and continues to be the subject of controversy.
- 62) See Wald, note 49.
- 63) Karen White and Stephan Brody, "The Use of Bail Hostels," *Criminal Law Review* (London: Sweet & Maxwell Ltd., July, 1980), discussing alternatives to jail for those who would have been incarcerated pretrial because of no permanent address.
- 64) Census of Jails and Survey of Jail Inmates, 1978, National Prisoner Statistics Bulletin, No. SD-NPS-J-6P, Feb. 1979, U.S. Department of Justice.



Arbitration and the Evolution of Compulsory Legal Process in Ancient Greece: Homer to Aristotle

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"The Athenians claim they were the first to establish regular legal processes."

ΔΙΚΑΣ ΔΟΥΝΑΙ ΚΑΙ ΛΑΒΕΙΝ ΤΗΔΕΝ ΑΘΗΝΑΙΟΙ ΠΡΩΤΟΙ.⁵

INTRODUCTION

One of the most admirable institutions of classical Athenian jurisprudence was the system for arbitrating practically all civil cases. This system was both an expression of the democratic ideals and practices of golden age Athens, and the zenith of a thousand-year-long process of historical development. It has been said that the fundamental requirement of a regular legal process is that it should be compulsory. An aggrieved person must have the power to force the one who wronged him to appear before a court, which holds regular sittings as the need arises.² I will trace the development of arbitration from a voluntary agreement between individuals to the compulsory arbitration of disputes by the state, in order to indicate how the classical Athenian concept of jurisdiction, evolved with and from arbitration.

Homer

The earliest evidence of arbitration in Greek culture is preserved in various passages of epic poetry from the *Iliad* and the *Odyssey*. Composed orally and then written down around 800 B.C., they show events which occurred around 1200 B.C. These events show unmistakable indications that arbitration

had become a regular and normal proceeding by this early time.

The central theme of the *Iliad* is the wrath of Achilles arising from a dispute with Agamemnon. The events of the epic revolve around this wrath: how it is aroused, its consequences, and its ultimate resolution. This dispute and its ultimate resolution provide us with the best examples of early arbitration proceedings.

By book xix the disastrous consequences of his wrath have finally descended on Achilles himself as they have already on the Greek army. The hero wants revenge for the slaying of Patrokles, but is commanded by the goddess Themis, his mother, to first call an assembly and renounce his wrath in order to end the feud with Agamemnon. Having assembled the Greeks, Achilles acknowledges his fault in the matter and states his willingness to resolve the dispute.

Agamemnon replies with a verbose apology of his own, after which he states his readiness to pay adequate compensation for the insults that aroused Achilles' wrath. Achilles politely declines the offer; being anxious to avenge Patrokles, he does not wish to wait until he has received and inspected the compensation. Odysseus, assuming the role of arbitrator,³ intercedes and admonishes that a settlement between the two former antagonists should be ceremoniously performed. The compensatory booty should be conveyed "into the middle of the *agora* so that all may view [it] with their eyes," not just Achilles. The prizes are brought into full view, an animal solemnly sacrificed, a solemn oath sworn, and finally Achilles, in brief but formal reply, acknowledges his responsibility for the disastrous effects of his wrath upon Agamemnon and the entire army as well. The *agora* is at last dissolved, after it has been witness to and guarantor of the termination of a feud, achieved under the superintendence of an arbitrator.⁴

It is important to distinguish the process just described from mediation or mere counselling, where there is no power to bind the parties to their settlement. Here Odysseus and the assembly function together both to facilitate and to sanction the agreement reached. To achieve a binding result, certain conditions must be met. Although the feud is between individuals, justice can only be achieved with the participation of the assembly, functioning as a forum for rhetoric addressed to the issues that have arisen.⁵ This is why Achilles had to call an assembly in order to renounce his wrath and end the feud, instead of just going to talk to Agamemnon privately. Furthermore, since there is no way to exchange documentary evidence in a preliterate society, the assembly is also necessary as a mass witness to remember the exchange of goods and honor which they have seen and heard.

There are several more episodes in the *Iliad* which enact the settlement of a dispute carried out orally in public and rendered effective because they are witnessed by the community acting as a body. Most notable among these are the dispute between Menelaus and Antilochus over the results of a chariot race in book xxiii, and the "trial scene", as it is known, on the shield of Achilles described in book xviii.

After examining these scenes it is necessary to distinguish the arbitral function of the assembly as it is described making equitable settlements, from the more strictly legal function of a jury or judge making decisions according to the law. This can be difficult and confusing, since there are elements of both present. But often in Homer we find what we would think of as separate things mixed together; this is true for two reasons. First, it reflects the world view of the Homeric Greek, which was generally wholistic and non-analytic.⁶ Second, it represents a related group of concepts in their early, unrefined condition, before the historical process of development and differentiation. In Homer there is not yet a distinction between private and

public arbitration because conflicts are viewed as existing between individuals, and because the abstract conception of "the public" has not yet developed. Similarly, we find the functions of arbitrator, judge, jury, popular assembly and war council all intermixed in the form of the Homeric *agora*, before they have become the distinct and specialized functions of classical times.

There are no witnesses as we know them involved in Homeric arbitration. Homer used the word *μαρτυρος* which later developed the meaning "witness" in a trial related sense, to describe the gods in whose names oaths were sworn, asking them to "witness" the oath and thereby sanction it. Several times the word is used of persons familiar with an event or situation, but they are not summoned either as formal or general witnesses.

It may also be noted that in the world of which Homer signs there were no real assurances that an arbitrator's award would be enforced, even when fortified with oaths and sureties. In the end, the only compelling forces were custom and public opinion. These are represented by the goddess Themis, when she commands Achilles to call an assembly in order to end his feud with Agamemnon. "In a closely knit ancient community a man could not lightly disregard these powerful forces."⁸

The final passage of Homer which I will discuss is also one of the most significant, for our purposes. It occurs when Odysseus is describing his escape from Charybdis on a timber from his wrecked ship:

ἦμος δ' ἐπὶ δόρπον ἀνὴρ ἀγορήθεν ἀνέστη
κρίνυν νείκεα πολλὰ διαζομένων αἰζῶν
τῆμος δὴ τὰ γε δούρα χερύβειος ἐξέφάνθη. 9

Late, at the time when men leave the law courts for dinner, / after judging many disputes brought by litigious young men, / this long I waited for Charybdis to cast out the timbers of my wrecked ship.⁹

The importance of these lines lies in the fact that the chiefs and elders, not waiting to be sought out as arbitrators, hold regular sessions in the *agora* to settle the disputes of all those coming before them. In the course of a single session lasting the better part of a day they judged many cases. Here we see the beginning of the next stage of development, from the purely voluntary and *ad*

hoc nature of arbitration in the *Iliad*, to a more regular and institutionalized proceeding.

Hesiod

Hesiod portrays a much more advanced stage of legal development than is found in the Homeric epics. Witnesses as we know them were present, and it was customary for litigants to substantiate their statements with testimonial evidence.¹⁰ Within each district the petty chiefs composing the dominant aristocracy met regularly in the chief city and adjudicated disputes.¹¹ Although the exact time when arbitration became obligatory in practice cannot be pinpointed, "a virtual compulsory legal process had been evolved about the beginning of the seventh century."¹²

There is a lively dispute among scholars as to the best way to describe this last development. Steinwenter, commenting on the description in Hesiod's *Theogony* of the ideal king dispensing justice, pushes the point that this cannot really be called "compulsory legal process" because there are no constitutions or statutes yet.¹³ Strictly speaking, he is right. However, Bonner and Smith stress that:

"there is the danger of missing important developments in the early judicial history of the Greeks if we insist too rigidly upon the application of modern legal and constitutional standards. The judicial powers exercised by the authorities...were not conferred upon them by action of any sovereign body in the state. They were derived rather from tradition, custom, and precedent."¹⁴

The point is that the peasants treated the process as if it were obligatory, and obeyed the judgments handed down. Therefore the compromise designation "obligatory arbitration" is proposed, because it emphasizes the degree of compulsion while it also carries the idea of equitable settlement rather than strict legal adjudication.¹⁵

Still, voluntary arbitration existed as it had before in Homer; and as it would later in Athens, it existed side by side with obligatory arbitration. This can be discerned from Hesiod's proposal to his brother that they submit their dispute to arbitrators of their own choice, rather than submit again to the "bribe-devouring kings."¹⁶

We saw at the end of my earlier discussion of Homer how the *ad hoc* and voluntary arbitration process had begun to evolve into a more regular and institutionalized proceeding. Now in Hesiod we find that arbitration by a council of aristocratic elders is practically mandatory. There are several factors which motivated continued development in this direction.

The Homeric community acted as a group in many respects. In religion, the community sought the favor of the gods through public sacrifices.¹⁷ Cooperation was also essential for mutual protection against neighboring tribes of potential enemies, and in war. Feuds and disputes between members of the community tended to weaken it, especially in a small group based on blood-ties, where a blood feud could escalate to the point that the entire community was allied into factions. Clearly it was in the group's interest to avoid disputes which weakened it, and therefore that public opinion would favor the developing institution of arbitration as an effective means of settling these disputes. Where formerly an individual might have decided to forego arbitration and depend on his friends and family for aid in a self-help resolution of the conflict, he would very likely feel compelled to arbitrate when he discovered that his friends and family not only would not help him, but urged him to settle peacefully at the council of elders.

Furthermore, it was in the interests of the ruling aristocracy to encourage and provide arbitration in this fashion, for it increased their political power and prestige. This would be especially so if it appeared to a party that a judgment in his favor was more likely to be obeyed when rendered by the council, for that party would naturally be grateful to them, and prefer that forum in the future.

Another important factor in the evolution towards obligatory arbitration was the force of habit and example. Over generations the practice of resorting to arbitration would tend to become a recognized custom, and custom in primitive societies is law such as it existed before the development of codes and modern legal institutions.

All these factors must have been enhanced by the increased stratification of society in Hesiod's time. Poor peasant farmers were likely overawed by the

aristocrats who alone could afford armor, horses, martial training, a diet of meat which made them larger and more physically powerful, and who controlled many of the religious institutions. It is easy to see how the people would come to view themselves as inferior and the aristocrats as more likely to be wise enough and powerful enough to render good and binding decisions.

Finally, it appears that there was an economic incentive. What had been in Homeric times a system of challenge and wager as an inducement to arbitration,¹⁸ survived as the practice of paying the arbitrators a fee.¹⁹

Drakon Through Perikles

Almost nothing survives of the laws of Drakon except the law of homicide. Of Solon's reforms much more is known, some from his own poems. One reveals that a major goal of his was to reform the system of giving judgments, since it had become the primary means by which the rich oppressed the poor.²⁰ Towards this end Solon for the first time introduced appeals of arbitration decisions to the people.²¹

Aristotle asserts that the only share in the reformed constitution granted by Solon to the poorest class, the thetes, was membership in the ekklesia and the dikasteries.²² He also says that appeal to the dikasteries was what contributed most to the people's power.²³

During the reign of the tyrant Peisistratus a whole new system was created. It was his policy to keep the people on their farms, to prevent them from interacting as much as possible and to keep them from massing in the city. Towards this end he was in the habit of going out into the farm areas settling disputes:

... καὶ αὐτὸς ἐξῆλθε πολλάκις εἰς χώραν,
ἐπισκοπῶν καὶ δικλύνων τοὺς διαφερομένους. ^{25/}

"And he would often go himself into the countryside, overseeing and reconciling those contending with each other."²⁴

The last three words immediately suggest arbitration. Naturally he would try to reach a compromise that satisfied both parties before enforcing a judgment

based solely on his authority as tyrant, which would have a greater tendency to inflame the people against him. Eventually, he conceived of the idea of furthering his general policy by delegating this function and appointed officers to go on circuit through the villages. Called

δικασταὶ κατὰ δῆμους

"judges by demes" they were, like Peisistratus himself, primarily arbitrators, authorized to give a binding verdict if they failed to effect a friendly compromise.²⁵ Their exact number is unknown. It has been suggested that Peisistratus, by sending out these "rural justices" was also seeking to strengthen his hold on the people by substituting his own adherents for the local arbitrators.²⁶



Under the new system when a dispute arose either party could challenge his opponent to submit the matter to one of the judges, just as they might have submitted it to an arbitrator chosen by themselves. The advantage was that a suitably objective arbitrator was provided, and the problems usually associated with finding an arbitrator agreeable to both were avoided. If the challenge was accepted, the judge endeavored to facilitate an equitable settlement, which if accepted was recorded as final. If no agreement was reached, or if the challenge to arbitrate was not accepted, then the judge sent the case up for a jury trial.³²

Sometime after the end of the reign of the tyrants the rural justices were eliminated. It is not known exactly

when, but many scholars believe that it was during the time of the reforms of Kleisthenes, sometime before the end of the Persian Wars. Kleisthenes was not a political reformer by conviction, but believed he could establish himself as a popular leader by preventing the return of the tyrants and weakening the nobles.²⁷ With this goal in mind he apparently not only eliminated the judgeships which had been filled by the tyrants' cronies, but he completely reorganized the Athenian system of tribes.²⁸

The rural justices were re-established in Periklean Athens, in 453-452 B.C. They now numbered thirty because of their connection with the thirty districts of the reorganized Athenian tribe system and became known as "The Thirty". Aristotle definitely associates these thirty judges with the Peisistratan rural justices:

ὅτε δὲ πέμπτη μετὰ ταῦτα ἐπὶ Λυσικράτους
ἀρχόντος οἱ τριάκοντα δικασταὶ κατέστησαν
πάντες οἱ καλούμενοι κατὰ δῆμους. ^{30/}

"In the fifth year after this, when Lysicrates was archon, the thirty judges were re-established, namely those who had been called judges by demes."²⁹

They too went on circuit. There were also some new refinements dictated by the democratic spirit of the times. Under Peisistratus it was a simple matter for the tyrant to delegate to these judges his power to make a binding judgment when the parties could not agree on an equitable settlement. To fifth century democrats however this would have been an anathema and would have challenged the supremacy of the dikastery. They would never have tolerated a return to final verdicts rendered by a single individual, and the more important a case was, the greater the amount at stake, the more this would be true. Therefore the new judges were allowed to make final decisions only in disputes involving small amounts and the possibility of appeal to a democratic court was preserved for more important cases.³⁰ As in earlier periods the parties could always resort to private arbitration, and were not required to bring their case before one of these judges.³¹

Classical Period Through Aristotle

After the commencement of the Peloponnesian War and the death of Perikles, there was an oligarchic reaction by the aristocracy against the democrats, known as the reign of the Thirty Tyrants. When democracy was re-established in 403 B.C. one of the most important changes made while reorganizing the judicial system was the replacement of the thirty traveling rural justices with a new board of forty magistrates, four from each of the ten tribes instead of three as before. At or about the same time another law was passed instituting a comprehensive system of arbitration, and establishing the public arbitrators so admired by modern scholars.³³ The forty, as they were known, no longer went on circuit, and virtually all of the arbitral functions of the former thirty were given over to the new public arbitrators. Arbitration was no longer optional for the parties, subject to the decision of one or the other to issue a challenge or wager to arbitrate, but was now mandatory in virtually all private civil cases.³⁴ Private, voluntary arbitration was still possible and often practiced, with decisions thus reached given the binding force of a final jury verdict under the new law,³⁵ but now the only way to get a jury trial was to arbitrate the dispute first, and then appeal to the *heliaia* if not satisfied.³⁶

There were many reasons for this reorganization and division of authority. To begin with, after the terror imposed by the Thirty Tyrants the Athenians had such an intense hatred of them and anything associated with them, even to their name "The Thirty," that the number of judges was increased. This at least is the view accepted by many historical commentators.³⁷ In addition, the constant threat of land attacks by Sparta as the Peloponnesian War dragged on caused many of the country people to crowd into the city, thus reducing the need for the judges to go on circuit.³⁸ This would also tend to decrease the need for a connection with the *trittyes* so that the number need not be fixed on thirty.

Finally, at the end of the fifth century the Attic law courts began to be very crowded, and in view of the large number of jurors to be paid for, as well as the usual elaborate legal machinery,³⁹ at a time when the state had just been drained by a twenty-eight year war, there must have been great pressure to find a way to cut down on the cases requiring juries. Further economy was achieved even in those cases which did come to juries by appeal, because the law also required that all evidence could be produced first at the arbitration, and no new evidence could be introduced at trial.⁴⁰ The arbitrators themselves cost the state nothing, being drawn from the lists of those in their last year of military duty, and their fee being paid by the parties themselves.⁴¹



It is typical of the Athenians that these reforms were both clever and democratic. Economy did not come at the price of limited access to the courts, but by spreading the judicial function out amongst the people, one man per case instead of 201, or 501, etc., with the right to trial by the larger community of course preserved. As had been the case since Homer, arbitrations were still held in some public place, open to all who cared to observe the case, so that the community might still be a witness to and guarantor of the proceedings.⁴² And this was no revolutionary development, because it was by that time an ancient custom to refer disputes to private arbitration, and therefore the changes

were probably readily assimilated by the people, or at least met with no great resistance. Control over the impartiality of the large number of arbitrators was maintained by making the penalty for violation of the oaths of office very severe: *atimia*, or loss of all citizenship rights, all property rights, and all protection of the laws.⁴³

CONCLUSION

We have seen in Homer the beginnings of compulsory process of law in Ancient Greece. It began with contestants submitting voluntarily to arbitration before the assembly and foregoing self-help in asserting their claims. This system is the only one for settlement of disputes between members of a community which can be detected in Homeric society.⁴⁴ By the time of Hesoid this practice has become so customary that it is obligatory, and still functions as the only means of dispute resolution. And finally, by the time of the restoration of democracy in 403, we see that arbitration has come full circle: it is again the primary means of dispute resolution, invoking public participation both in the process of reaching a judgment and then in enforcing it afterwards.

What began as the will of the participating parties became, as the community became more aware of itself as a participant in these disputes as well (at least to the extent of desiring a peaceful settlement), became the will of the community itself. This trend is already clear in Homer, because by then the participation of the community is an essential element of the resolution of a conflict between two individuals.⁴⁵ Public opinion, in the main, always favored an arbitrated settlement of a feud over one fought out between clansmen, and over time the idea that arbitration *should* be done to protect the community's interest, became the idea that the community's interest was paramount and that this gave it the right to *require* its members to arbitrate their disputes.

There has been much scholarly discussion on the origins of judicial process in Greece and in particular in Athens. Steinwenter published a very influential study which argued that jurisdiction by

an organ or organs of the state had its sole origin in voluntarily accepted arbitration. According to his theory, although disputants tended to choose as arbitrators men who had special experience or skill in making decisions drawn from divine inspiration, the fact that these men were also kings or nobles was almost accidental.⁴⁶

Professor Bonner is also of this view. He believes that disputants were to be expected to prefer the services of a king or other prominent person whose integrity and judgment inspired confidence. From this practice arose the notion that settlement of disputes was a royal prerogative. He explains there is an apparent contradiction as it applies to Hesiod's view of "bribe-devouring kings" (who certainly did not inspire confidence by integrity or judgment).⁴⁷ It is in Hesiod's time that we are first able to detect obligatory participation in dispute resolution; under such circumstances it seems unlikely that the Steinwenter-Bonner theory would account for the association between administering justice and the sovereign.

The major problem with this theory is that it fails to account for the critical step which associated a dispute ending arbitral judgment with the sovereign power of the state, whether king, body of nobles, or popular assembly.⁴⁸ Kings are described as "natural" arbitrators, the step from royal arbitrator to council

of aristocrats is "not a far cry," and the development of mandatory arbitration was "only a question of time." It is not plausible to suggest that voluntary submission to arbitration became mandatory simply by the passage of time, the force of custom, and the "naturalness" of the association. Quite the opposite: a critical element in this development from the very beginning was the power of the community, acting through its institutions (kings, nobles, assembly) to limit the range of self-help and to end disputes which were a threat to the solidarity of the group.⁴⁹ Rather than two stages of a single historical process, the resolution of disputes by arbitration and the intervention of the sovereign were two parallel processes, each encouraging the other.

The institution of a board of public arbitrators in 403 B.C. was the zenith of this parallel development. Private arbitration had been practiced by the people all along; now that the people were the sovereign they made a public institution of what had served them so well, and became sovereign arbitrators. It was a new institution of the best type, at once an embodiment and expression and drawn of the culture and its development. And it was an expression of a sparkling democratic insight: that the need for arbitration, and the power to enforce it, had really been theirs all along.

FOOTNOTES

1. Aelian, *Vera Historia*, iii.38
2. Bonner and Smith, *The Administration of Justice from Homer to Aristotle* vol. 1, p.61
3. *Iliad*, xix. 172 ff. Literally, the Greek translates as "manager of justices". This is translated as "arbitrator" by E. Havelock in *The Greek Concept of Justice*. So too Bonner and Smith, p.24.
4. Havelock, p.132.
5. *Ibid.*
6. cf. Finley, *Four Stages of Greek Thought*.
7. Literally "martyr".
8. Bonner and Smith, p.49.
9. *Odyssey* xii. 439 ff.
10. Bonner and Smith, p.42.
11. *Ibid.*, p.44.
12. *Id.*
13. Steinwenter, *Die Streitbeendigung durch Urteil, Schiedsspruch und Vergleich nach griechischen Rechte*, p.42.
14. Bonner and Smith, p.48.
15. *Ibid.*
16. *Works and Days*, 35 ff.
17. *Odyssey*, iii. 5 ff.
18. *Iliad*, xxiii. 485 ff.
19. Meier and Schoemann, *Der Attische Process*, 8.5 ff.
20. Solon, 3.32.
21. A.W. Harrison, *The Law of Athens*, vol. 2, p.72.

22. *Athenaion Politeia*, viii.3.
23. *Ibid.*, ix.1.
24. Aristotle, *Ath. Pol.* xvi.5.
25. (My translation and emphasis.)
H.C. Harrell, *Public Arbitration in Athenian Law*, p.4.
26. Bonner and Smith, p.318.
27. *Ibid.*
28. The reorganization of the tribes was a political measure intended to break up the power of the nobles and to facilitate the assimilation of new citizens who had immigrated to Attica after her victory over the Persians. The unit of the new tribes was the deme, not the clan. In the deme system local association was substituted for community of relationship. The system of tribes, trittyes and demes was intricate and artificial, and is analogous to modern gerrymandering. The demes of Attica were divided into 3 areas: the city, the port and coast, and the interior rural areas. The demes in each area were distributed into 10 groups called "trittyes"; and 3 trittyes, one from each area, constituted a tribe. The tribe was no longer a geographical unit but contained elements from the inhabitants of the city, the coast, and the interior. This produced 30 districts (3 areas \times 10 trittyes each).
29. Aris. *Ath. Pol.* xxvi.3
30. Bonner and Smith, p.352.
31. *Ibid.*
32. *Id.*
33. Harrell, p.4.
34. Arist., *Ath. Pol.*
35. Harrison, p.64.
36. Arist., *Ath. Pol.*
37. Lipsius, *Das Attische Recht*, p.342.
38. DeSanctis, *Atthis—Storia della Repubblica Ateniese*, p.342.
39. Harrell, p.8.
40. Arist., *Ath. Pol.*, liii.2, liii.3
41. Harrell, p.22-23.
42. D.M. McDowell, *The Law in Classical Athens*, p.208.
43. Arist., *Ath. Pol.*, liii.6.
44. Harrison, p.69.
45. cf. pages 3-6 of this paper.
46. Steinwenter, p.29 ff.
47. R.J. Bonner, *Lawyers and Litigants in Ancient Athens*, p.30.
48. *Ibid.*, p.31.
49. Harrison, p.70.



The Proposed General Consumption Tax and Other Selected Aspects of Japanese Taxation

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Introduction

This paper will deal with certain aspects of Japanese Taxation. The discussion will be opened by a brief outline of Japan's demographics, industrial structure and economy. This will be followed by explanation of the concept of income in Japan. Next will be an overview of the Tax Structure with emphasis on selected aspects including treatment of capital gains and tax incentives. Finally, the 1979 tax reform with the proposed General Consumption Tax (GCT) will be outlined, followed by the author's observations and conclusions.

Japan's Demographics

By any standard, Japan is a small country in terms of land area: 143,750 square miles, the size of the State of Montana. Its population, as estimated in 1981, is approximately 120 million, half that of the United States. Japan's population density, 306 inhabitants per square kilometer in 1977, was the highest in Asia after Bangladesh (559) and

Korea (370). That is more than 830 inhabitants per square mile. The population density of the United States is only 59 inhabitants per square mile. Therefore, Japan is nearly 15 times more densely populated than is the United States!

Its population growth rate is 0.9% per year compounded over the period 1975-1979, the lowest in Asia. Tokyo is the capital, with a population of approximately 9 million. The literacy rate of Japan as a whole is 99 percent.¹

Japan's population was classified in 1979 as being 75.9% urban. This was the highest proportion in East Asia except for a few city states. This proportion has benefited the tax system both because city dwellers are easier to tax than rural people and also because it has made possible the rapid growth of the economy, and of tax revenue.² Likewise, a high proportion (67% in 1978) of the population is in the economically active age group 15-64. The dependency ratio is only 49%. In 1974, 30% of income tax revenue came from taxpayers who had no dependents and only 10% from taxpayers with 4 dependents or more.³

The political structure is a constitutional monarchy with a parliament (Diet) having two houses, a House of Representatives and a House of Councillors. The Diet elects the Prime Minister who then appoints the cabinet. Fundamental rights are protected in the constitution, and the courts may declare legislative and executive acts unconstitutional.⁴

The main religions are Shintoism, Buddhism, and Christianity.⁵

An Overview Of Japan's Economy

The Japanese economy grew faster than any other in the world during the 1960's, except for a few oil producing states.⁶

Its infrastructure is excellent, and its economic growth has been largely based on manufacturing exports. Manufactur-

ing represents more than 30% of Net Domestic Product (NDP).⁷ The largest sectors of the economy are machinery and transportation equipment. Fast growing sectors have included motor vehicles, (Japan is the world's largest producer), general and electrical machinery, especially electronics, and quartz crystal watches. Japan is also the world's largest producer of ships, and the world's second largest producer of synthetic fibers, paper, cement, synthetic resins and steel.⁸

Some 75% of Japan's imports represent raw materials and some 54% of her exports represent machinery and transportation equipment. Although Japan has few mineral resources and has to import almost all its raw material and food, it still has the second largest economy in the non-communist world after the United States.⁹ Economists predict that at the present rate of economic growth, Japan will overtake the United States in the next decade to be the leading economic super power.¹⁰

Taking a world view of Japan's economy is a staggering exercise. Japan accounts for 10% of the world's Gross National Product, even though it has only 3% of the world's population and a tiny 0.3% of the world's land of which only 15%, (.00045%) is arable. Japan's Real GNP growth rate for the years 1979, 1980 and 1981 is noted below.¹¹

| Real GNP Growth Rate | | | |
|----------------------|------|-------|-------|
| Countries | 1979 | 1980 | 1981 |
| Japan | 5.9 | 5 | 4 |
| United States | 3.2 | -0.75 | 0.75 |
| West Germany | 4.5 | 1.75 | -0.25 |
| Great Britain | 1.6 | -2.25 | -2 |
| OECD Average | 3.3 | 1 | 2 |

Japan's economic success is attributed to a number of different political and economic causes including the high rates of savings and investment.¹² Labor productivity across all sectors is generally very high. Its labor force is 42% white collar, 11% farmers, and 47% blue collar, of which 30% are craftsman and

production process workers.¹³ Labor unions are organized on an enterprise basis. In general, wages and promotions are based on age and length of service. "Permanent employees" are employed for life.¹⁴ Just as the share of Japan's imports of manufactured goods is *low* by international standards, so is its share of export of manufactures exceptionally *high* by international standards.¹⁵

Overall, Japan's economy can be characterized as a fast growing, highly productive economy whose imports are mostly raw materials and whose exports are highly manufactured goods such as cars, ships, machinery and electronics. The ratio and character of imports to exports and the productivity and urban character of its labor force seem to be the key factors in Japan's economic success.

The Concept Of Income In Japan

Any attempt to explain or understand aspects of Japanese income and capital gains taxation must be based on an understanding of the Japanese concept of taxable income. Income is imposed on individuals by the income tax under the Income Tax Law,¹⁶ and on corporations and other entities by the juridical persons tax under the Juridical Persons Tax Law.¹⁷

First will be a discussion of the concept of income for individuals, followed by a similar discussion of the concept of income of corporations and other juridical persons.

The Concept of Income of Individuals

Scholars have tried to characterize the concept of income under both the "new worth accretion" theory and the "source" theory.¹⁸ One author comes to the conclusion that prior to the end of World War II the income tax was founded upon ideas of the sort expressed in the source theory. This conclusion is buttressed by the fact that from its inception until 1947 the Japanese Income Tax Law expressly excluded "occasional income," (including fortuitous or casual receipts and capital gain) from taxation.¹⁹ As early as 1899 the statute began a detailed categorization of income for computational purposes. This source view prevailed until about 1950. Although a basic taxpayer deduction and

deductions for dependents, incapacitated persons and life insurance premiums existed as early as 1913,²⁰ it was not until 1950, upon the suggestion of the Shoup Mission, that Japan introduced a deduction for miscellaneous losses — such as extraordinary personal losses resulting from theft or casualty, and a deduction for medical expenses.²¹

The source theory of income generally does not include fortuitous or casual receipts and capital gain (i.e. gifts inheritances, lottery prizes, and gain or loss from the sale of property other than stock in trade) in income. The net worth accretion theory takes into account interest paid on indebtedness, extraordinary living expenses and losses from the damage or destruction of property and considers as income the profit or loss resulting from a write up or write down in the valuation of assets.

As time passed, more aspects of the net worth accretion theory became integrated into the income tax law.²²

The current categorization of the concept of income in Japan probably leans more toward the net worth accretion theory than the source theory. Today, all fortuitous or casual receipts and capital gains (with the important exception of transfers of stocks, bonds and other securities²³) are taxed and capital losses are fully deductible. Remuneration paid in kind, and in principle, gifts and inheritances are considered income. However, in the case of gifts, only gifts from juridical persons are included for tax purposes since separate inheritance and gift taxes are imposed on the hereditary estates and gifts of individuals.²⁴

Gain which results from a cancellation of indebtedness is taxable if it can be included within one of the income categories to be later discussed. However, it may also be treated as a gift and if so is not taxed to the donee. With some *de minimus* exceptions, consumption of one's own farm products, and one's own stock in trade is considered income and is so taxed.²⁵ An individual, unlike a legal entity may not write up or down the value of his assets and treat the change as valuation profit or loss. Likewise, the imputed rent of one's own home is *not* taxed, although this was strongly recommended in the first part of the century.²⁶

The overall conclusion that can be reached is that the net worth accretion theory, with some adjustments is the correct characterization of the concept of income of individuals in Japan.

The Concept of Income for Corporations and Other Juridical Persons

The concept of income in the juridical persons' tax is less cloudy. It has long been assumed both by the tax administration and the courts that the net worth accretion theory applies.²⁷

The Japanese Juridical Persons Tax Law states that: "[t]he pecuniary amount to be included in the amount of proceeds of the said business year, in the computation of the amount of income of each business year of a domestic juridical person, is the amount of gain of the said business year pertaining to the sale of assets, the assignment of assets or provision of services for value or gratuitously, the acceptance of the gratuitous assignment of assets and other transactions, aside from capital transactions, etc., except where prescribed otherwise."²⁸

This view has been accepted by the courts since as early as 1917.²⁹ Therefore, proceeds include not only receipts from the sale of merchandise and manufactured goods, interest on loans, gifts, inheritance, prizes, capital gain (*including* that derived from the transfer of stock and other valuable securities), and any other miscellaneous inflow which directly increases assets of the entity, but also includes any transaction which decreases its liabilities such as the cancellation of indebtedness. Proceeds even include unrealized gain from a juridical person revaluing its assets in excess of acquisition value (cost) where permitted by law. Proceeds do not, however, include "imputed" rent of buildings owned and occupied by the entity.

Payments into capital are likewise excluded.³⁰ Outlays, the opposite side of the coin, cover such things as expenses and costs required for the sale of merchandise, manufacturing expense, interest expense, and bad debt expense. Donations once viewed broadly, are now quite limited. Returns of capital, or a disposition of profit, as in a dividend,

are not taken into account.³¹ In light of an understanding of the concept of what constitutes income in Japan, let us now look broadly at the overall tax structure.

TAX STRUCTURE

This section will discuss the overall tax structure of Japan. It will present the general mechanism by which taxes are computed for individuals and juridical persons. Unusual aspects of the system will be highlighted as will treatment of capital gains and special tax incentives.

Overview

Most (69%) of Japan's tax revenue comes from the income and corporation tax. Indirect taxes contribute only 29%.³² Japan has no sales or value added tax.³³ However, there exist many excise taxes such as liquor tax, sugar tax, commodity tax, playing card tax, gasoline tax, LPG tax, petroleum tax, travel tax, admission tax (theaters), motor vehicle tonnage tax, etc.³⁴ Other significant taxes include land and property taxes, inheritance and gift taxes, payroll taxes (social security), stamp taxes, and securities transactions taxes.³⁵ The stamp tax is a tax on an individual or corporation that prepares documents such as contracts, power of attorney, promissory or exchange notes, etc. Rates depend on the nature of the documents and the amounts contained in them.³⁶ Lastly, there are local income and inhabitant taxes levied both on the prefectural (state or county) level, and on the municipal (cities, towns and village) level.³⁷

Tax Computation for Individual

For individual Japanese taxpayers, computation begins by determining three totals: (1) pecuniary amount of total income; (2) pecuniary amount of severance income; and (3) pecuniary amount of forestry income.³⁸ This is done by first classifying all receipts other than nonincome, nontaxable income and exemptions, into one of ten categories enumerated below, and then making the expense deductions permitted under each category.

The different categories of individual income are:³⁹

1. Interest income
2. Dividend income
3. Income from immovables (rents and leases)
4. Business income
5. Remuneration income
6. Severance income
7. Forestry income
8. Assignment income (capital gain)
9. Occasional income
10. Miscellaneous income

The remainder — except for severance and forestry income — are added together to reach a sum known as "total income" [1, 2, 3, 4, 5, 8, 9, 10]. Severance income and forestry income are taxed separately.

The next step calls for the subtraction of various special deductions ("deductions from income") from the amounts of total, severance, and forestry income in a prescribed order. The final results are the "taxable total income," "taxable severance income," and "taxable forestry income" against which are applied the graduated rates contained in the Income Tax Law.⁴⁰

Rather than indulge in a lengthy discourse on what is included in each element of income, only selected items will be discussed in detail, with others discussed generally. Interest income does not include a number of items:⁴¹

(1) Interest accruing from postal savings and bank current deposits not exceeding Y 3,000,000 (approximately \$15,000).

(2) Interest or distribution of profits from deposits or joint operation trusts made by students of schools such as primary schools, junior high schools, or senior high schools on the instruction of the principal of such schools.

(3) Interest or distribution of profits from deposits of joint operation trusts, bonds and debentures, open end bond investment trusts or specific stock investment trusts if the total principal does not exceed Y 3,000,000 and the tax payer submits a "small savings tax exemption form" to the District Tax Office.

(4) Interest on certain government bonds and the individual submits an exemption form — as above.

(5) Interest on deposits, etc. made under a savings scheme through their employers, principal not to exceed Y 5,000,000 (approximately \$25,000).



Income from immovables generally includes income from the lease of immovable property and rights therein or from the lease of ships or aircraft.⁴² Business income includes professional income (attorneys, doctors, accountants, etc.) and includes commerce, agriculture, fishery and manufacturing income.⁴³ Remuneration income includes salaries, wages, pensions, bonuses and other allowances such as payments from a qualified pension, contributions to which go untaxed during employment. The most important imputed component of this category is that payments "in kind" are included in income. Examples are: company housing where the "assessed rental" is included in the employee's income; low interest housing loans by employer; utility charges of the employee paid by employer; school fees paid by the employer for children of the employee. However, a company car furnished to an employee for business (and sometimes private use) creates no taxable benefit to the employee. Employees are also allowed an exemption for transportation expenses paid to them by their employer for travelling between residence and work and back.⁴⁴

Severance income includes lump sum pensions and other allowances paid by the social insurance system and the qualified pension. Certain per annum deductions are allowed.⁴⁵ This income is taxed separately from other income.

Forestry income, also taxed separately, comprises income derived from the sale or transfer of timber provided the income recipient has held the timber for more than 5 years.⁴⁶ Income derived from the sale or transfer of timber held 5 years or less is treated as assignment income (capital gains).⁴⁷ Occasional income consists of casual or windfall gains such as gambling receipts and prize money, but scholastic prizes such as the Nobel Prize or grants for certain educational and scientific purposes are excluded from income.⁴⁸ Miscellaneous income is a catch-all category embracing all sorts of income.

One notable exemption from income in the Japanese system is the exclusion of income earned from the sale of securities. This exemption applies *unless*

the income is derived from one of the following:⁴⁹

(1) continuous trading in securities consisting of transactions involving more than 200,000 shares per year;

(2) the sale of "forested shares;"

(3) the sale of substantial participation in a corporation in which the individual and his immediate relatives; (i) have owned, at any time during the year of sale, and the preceding 2 years, 50% or more of the capital stock of such corporation; (ii) have sold 10% or more of such stock within the year of sale; and (iii) have sold over 25% or more within 3 consecutive years; and

(4) The sale of securities embodying the right to use facilities.

Tax Computation for Juridical Persons

Thankfully, corporations do not have to go through the contortions individuals face in computing their tax. Instead, they arrive at their "income" by deducting their "outlays" from their "proceeds," terms which essentially correspond to the accounting concepts of "revenues" and "expenses."⁵⁰ Since no special deductions are available for juridical persons, the "pecuniary amount of income" and the "taxable income" are one and the same.⁵¹ Corporate capital gains are subject to the normal tax rates.⁵² The general rate applied is 42%, (national income tax). For income earmarked for payment of dividends, the 42% rate is reduced to 32%. Further, for a domestic corporation with a capitalization of Y 100 million or less (approximately \$437,000), the rates are reduced to 30% and 24%, respectively, for the first Y 8 Million (\$35,000) in income.⁵³

Treatment of Capital Gains

The Japanese name for capital gains is "assignment income." Generally, capital gains (after deduction of Y 500,000 [approximately \$2,200]) are aggregated with other income and subjected to income tax. When capital assets owned more than 5 years are sold, 50% of such capital gains are aggregated with other taxable income and taxed at regular rates.⁵⁴

Special rules apply to capital gains from sales of real property by individuals.

Gain from sales of real estate is classified as long-term or short-term for national income tax purposes, depending on whether the real estate was acquired before or after December 31, 1968. Long-term gain is generally taxed at a flat 20% up to the initial Y 40,000,000 (\$175,000) of gain, and by a designated formula for gain in excess of that amount. Short-term gain is generally taxed at a minimum of 40% under a designated formula. All gains from sales of real estate are taxed at a minimum of 6% and 12% for the prefectural and municipal inhabitant taxes for long and short-term gains, respectively.⁵⁵

The first Y 30 million (\$130,000) of gain from the sale of a principal residence in every three years is not subject to national and inhabitant income taxes. For gain in excess of Y 30 million, the tax rates noted above are used, depending on whether the principal residence was acquired before or after December 31, 1968.⁵⁶

Some capital gains are nontaxable. These are: (1) income derived from an assignment of "movables ordinarily necessary for living," (excluded from the definition of such items are precious stones, metals and works of art); (2) income from a forced conversion proceeding to satisfy debt; and (3) income derived from the casual assignment of valuable securities held as a portfolio investment (discussed *supra*); as noted earlier, however, there are some exceptions to this rule.⁵⁷

Special Tax Incentives

Japanese corporate income taxation provides some major tax incentives.⁵⁸ Among them are a vast variety of increased initial depreciation deductions for improved machinery, especially machinery used for the prevention of or diminution of environmental pollution, or for saving of energy.⁵⁹ Other examples include recycling machinery, steel vessels and aircraft used for transportation enterprises, machinery used in undeveloped areas, mining machinery, and machinery purchases by small or medium sized enterprises or agricultural cooperative associations.⁶⁰

Accelerated Depreciation is allowed for machinery used by members of com-

mercial and industrial cooperatives, and industries (i.e. textiles), which execute a plan for promotion of small and medium sized enterprises, machinery equipment and buildings of a corporation where 20% or more of the employees are handicapped, houses newly constructed for rent, and facilities for storage of petroleum products or grain.⁶¹

Special accounting reserves have also been created as incentives. These include: (1) reserve for price fluctuations in inventory; (2) overseas market development reserve for small and medium sized enterprises; (3) reserve for overseas investment loss; (4) reserve for prospecting for mineral deposits; (5) reserve for prevention of mineral pollution; (6) reserve for special railway construction, and other special reserves for construction of atomic power generation facilities and gas supply facilities.⁶² Some of the aforementioned incentives are also available to individuals who file "blue returns." Blue returns are designed to encourage the keeping of proper accounts, and in submitting a blue return, the taxpayer must furnish a balance sheet and other relevant documents in exchange for special tax treatment.⁶³

GENERAL CONSUMPTION TAX

Introduction

The focus of this paper now shifts away from the tax structure and will deal with the proposed imposition of a General Consumption Tax in Japan (hereinafter referred to as the GCT).

The proposal for the GCT, made in late 1977 by the Tax Committee,⁶⁴ resulted from Japan's increasing reliance on debt financing to balance its budget, for which the 1973 oil embargo is said to be a major cause. In fact, none of the other developed countries relies so heavily on debt financing as does Japan.⁶⁵ The ratio of bond issues to Central Government Revenue increased as follows:⁶⁶

| | | |
|-------------|-------------|-------------|
| 1974: 11.3% | 1976: 29.9% | 1978: 32.0% |
| 1975: 25.3% | 1977: 29.7% | 1979: 39.6% |

The situation at the local level is said to be similar. Another reason for the pro-

posed GCT is that current expenditures continue to exceed current revenues, and the Tax Committee does not foresee that rapid economic growth will close the gap in the future. Proposals to curb expenditures have met with resistance and hence the only viable alternative to close the budget deficits is to increase revenue drastically. This would not appear to be difficult since the ratio of the tax burden to national income in Japan is lower than in any other industrially advanced country.⁶⁷ This ratio is $\frac{1}{2}$ to $\frac{2}{3}$ of the equivalent ratio in other European Community countries.⁶⁸

In light of the strong opposition to raise individual income tax rates, the Tax Committee felt it would not be possible to raise the needed revenues by merely raising rates of existing taxes, and felt the only solution was to impose a new tax in the form of a GCT. This conclusion is logical in light of the fact that Japan's indirect tax burden on individual consumption expenditure is *significantly* lower than in European countries.⁶⁹

Outline of the Japanese GCT

The proposed GCT would be imposed on all goods and services at all stages of production and distribution and would be payable by all entrepreneurs who deliver goods, render services, or import goods into Japan.⁷⁰ It is unlikely that the GCT would resemble a turnover tax since introduction by the Japanese government of such a tax in 1949 met with complete failure.⁷¹ Consequently, it seems the GCT would resemble to a certain extent the Value Added Tax (VAT) as currently levied in the European Community countries (and is sometimes called "VAT Japanese Style"). Such a tax would be imposed on the difference between the sales price and the entrepreneur's purchase price.

The Tax Committee recommends the exemption of basic necessities (e.g. food) from the tax and also the exemption of exports. Small businesses would also fall outside the scope of the GCT.⁷² The major difference between the proposed GCT and the VAT as used by the European Community countries is that with the Japanese version the taxpayer does not need to compute the tax which has

been previously invoiced to him. Consequently, the purchaser will not know how much of the VAT is included in the sales price and how much is passed on to the consumer.

The main problem that the GCT faces is its general unpopularity in Japan. This is so because the GCT will raise the price of all goods and services and will fall most heavily on the low and middle income classes. Additionally, the GCT seems ill-suited to Japanese style business activities and is strongly resisted by most Japanese entrepreneurs.⁷³

Although adoption of the GCT was postponed in 1978 and again in 1980, Japan nevertheless is sliding more and more towards a GCT by imposition of higher tax rates on its existing indirect taxes.⁷⁴

The 1979 tax reform involved increases in indirect taxes and elimination of some inequities believed to be part of the popular opposition to the adoption of the GCT.⁷⁵

Indirect taxes which were increased were the gasoline tax, and the aviation fuel tax. Some direct taxes were also increased. This was accomplished by a reduction of medical doctor's fixed percentage expense deduction allowed from their fees received. This deduction was far too generous and was a source of discontent for many (except the doctors). Exemption of capital gain income from securities transactions by individuals has also been slightly cut back and a limit has been placed on the deductibility of entertainment expenses of corporations. Deductions which exceed specified amounts (depending on the capitalization of the corporation) are disallowed in whole or in large part and are added back to income and are taxable. The larger the corporation, the lower the allowable entertainment expense deduction! For example:⁷⁶

- (1) corporations whose capital is less than Y 10 million (\$13,700) may take a full deduction for entertainment expenses up to a maximum of Y 4 million (\$17,500) per year provided they can show such expenses are necessary for business;

- (ii) corporations whose capital is between Y 10 million and Y 50 million (\$43,700-\$220,000) may take an automatic entertainment expense deduction of Y 3 million (\$13,000);
- (iii) corporations whose capital exceeds Y 50 million may take an automatic entertainment expense deduction of Y 2 million (\$8750), (this deduction has been completely disallowed as of 1983).*

Moreover, tax incentives, some of which were discussed earlier, have been reduced or in some cases eliminated. The reserves for bad debts, for price fluctuations and for overseas market development for small and medium sized enterprises have been reduced. Likewise, some special depreciation allowances have been cut back.⁷⁷

The 1979 tax reform also resulted in short-term capital gains being taxed at a higher rate than if they were part of "normal" taxable income. Treatment of long-term capital gains remains largely unchanged, and in some special cases the rates are lower.⁷⁸

The 1980 Tax Committee Report re-emphasizes the need for increasing indirect taxation,⁷⁹ but again cites the existence of opposition to a "wide scale

consumption tax." The Report also notes that the cumulative amount of bonds issued to finance budget deficits has reached \$360 billion,⁸⁰ and that the only way to raise enough revenue to close the gap is to impose a GCT. Consequently, FY 1981 tax increases moved Japan slightly closer to a GCT.⁸¹ Liquor tax has been increased (rate depends upon price or quality class). Commodity tax rates have been increased as have the number of items subject to the tax. Stamp tax rates have been doubled, and the securities transaction tax has been increased.⁸² Corporate taxes were increased 2% and corporations with capitalizations not exceeding Y 10 million (\$43,700) are treated nearly alike to those with capitalizations exceeding Y 100 million (\$437,000). The opposition to the GCT remains, however, and recent protests from trade unions, consumers, and retailers especially indicates a trend that the government may consider excluding retailers from the GCT. This would make the tax a production or manufacturing tax. Since retailers would be excluded, it is expected that taxable persons will be registered to prevent abuse of the possibility to take a credit for tax paid on purchases.⁸³ The question still remains, however if such a tax, if and when implemented could generate enough revenue to finance Japan's budget deficits.

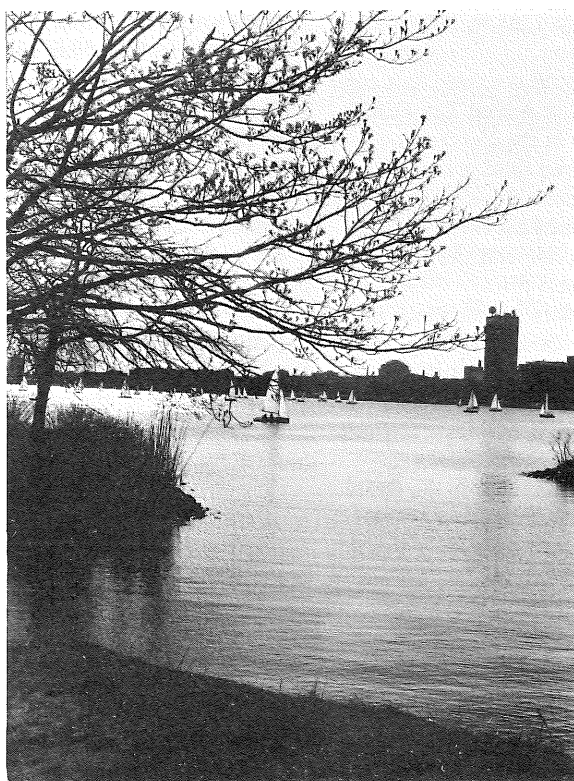
Conclusion

Japan's role as a leader in the world economy is something no longer subject to question. Her economic growth is largely attributable to the extreme productivity of her labor force and her ability to import low priced raw materials and export large quantities of technologically advanced, highly manufactured goods into the world market.

Over the years, the concept of income in Japan has broadened, and the once dominant "source" theory has been largely replaced by a system which more closely resembles the "net worth accretion" theory than anything else. Though not without some exceptions, this net worth accretion theory dominates contemporary thinking and is generally reflected in the provisions of the tax code.

Japan's economic growth has not come without cost, however. There is heavy, but decreasing reliance upon direct taxes, and special tax incentives, exclusions, and accelerated depreciation allowances have reduced government revenues substantially.

Deficits now seem to be the main concern of the Tax Committee, and rightfully so. Japan's increasing dependence on debt financing of current expenditures indicates the need for large revenue increases to balance the budget. Measures taken in 1979, 1981, and 1982 have helped increase revenues somewhat, and in the process Japan has slid closer towards the General Consumption Tax which has been proposed for some time. If popular opinion can be swayed to accept such a tax, large revenue increases will result, enabling Japan to maintain both a sound fiscal posture and economic growth in a world economy which is increasingly reluctant to accept her price-competitive exports and which seek to urge the Japanese government to allow more imports to meet the increasing needs of the Japanese population.



- 1) International Bureau of Fiscal Documentation, *Taxes and Investment in Asia and the Pacific*, ed. J. van Hoorn Jr., volume 2, p. Japan-1 Amsterdam 1983. (This is one of many comprehensive loose-leaf services that the Bureau publishes out of the Netherlands, and hereinafter will be cited as "Asian Taxes").
- 2) *Id.* at p. Japan-26-34.
- 3) *Id.* citing National Tax Administrative Agency.
- 4) *Id.* at p. Japan-2.
- 5) *Id.*
- 6) Dharamendra Bhandari, *Taxing for Development: Corporate Taxation in Japan*, 36 Bulletin for International Fiscal Documentation 99 (1982), (this is another publication of the International Bureau, see note 1 *supra*, and hereinafter will be cited by the author's last name and the volume number of the Bulletin followed by Bulletin I.F.D., the page number, and the year i.e., Bhandari, 36 Bulletin I.F.D. 99 (1982).
- 7) Asian Taxes, p. Japan-5,6 citing National Income Division, Economic Research Institute, Economic Planning Agency. Published in Japan Statistical Yearbook, 1981, p. 523.
- 8) *The Far East & Australia*, Europa Publications 1981-1982, p. 558.
- 9) Bhandari, 36 Bulletin I.F.D. 99 (1982).
- 10) *Id.*
- 11) *Id.* citing OECD Economic Outlook No. 28, December 1980 (1981 figures are estimates).
- 12) Asian Taxes, p. Japan-5.
- 13) *Id.* p. Japan-6 citing Statistics Bureau of Prime Minister's Office. Published in Japan Statistical Yearbook 1980, pp. 50-51.
- 14) Asian Taxes, p. Japan-3.
- 15) *Id.* p. Japan-9.
- 16) Coleman, *Taxation of Capital Gains in Japan and Korea in Light of the Concept of Taxable Income*, in Current Legal Aspects of Doing Business in Japan and East Asia, pp. 253-284, Chicago 1978. Citing Law No. 33, 1965 (hereinafter cited as ITL) (the article, hereinafter cited as Coleman, gives an interesting and thorough historical analysis of the theory of income in Japan which is beyond the scope of this paper).
- 17) Law No. 34, 1965 (hereinafter cited as JPTL).
- 18) Coleman, p. 256.
- 19) Coleman, p. 275 citing ITL of 1887, art. 3 (iii); ITL of 1899, art. 5(v); ITL of 1920, art. 18(v); ITL of 1940, arts. 11(vi), 29(ii); ITL of 1947, art. 9(8)-(9).
- 20) Coleman, p. 257.
- 21) *Id.* at p. 257, 276 citing ITL of 1947, arts. 11-4, as added by Law No. 71 of 1950.
- 22) See Coleman at pp. 253-257
- 23) This exception will be discussed further *infra*.
- 24) Coleman at p. 257.
- 25) *Id.*
- 26) *Id.* citing *A History of Meiji-Taisho Public Finance*, v.6, p. 1029, ed. Ministry of Finance, 1937.
- 27) See Coleman, pp. 256-263.
- 28) *Id.* at p.277 citing JPTL art. 22(2).
- 29) See Coleman, pp. 256-272 and cases cited therein.
- 30) *Id.* at pp. 258-259.
- 31) *Id.*
- 32) Asian Taxes, at p. Japan-18, (figures are for FY 1981-1982), See Mitsuo Sato, *Japan: Tax Structure and Fiscal Policy*, 32 Bulletin I.F.D. 255-259 (1978). (See consumption tax discussion *infra*).
- 33) See *International Tax Summaries — A Guide for Planning and Decisions*, ed. Alexander Berger, Coopers and Lybrand International Tax Network, p. J-9 (1982). (This work provides a concise overview of the tax system, and hereinafter is cited as ITS).
- 34) See *Fiscal Policy and Tax Structures in Australasia*, International Bureau of Fiscal Documentation, Amsterdam, 1978, pp. 69-74. For a thorough discussion and analysis of the effect of these and other taxes on Japan's revenue See Asian Taxes *supra* note 1.
- 35) *Tax Systems of Selected Countries in Asia and the Pacific*, National Tax Research Center, Republic of the Philippines, 1980, pp. 47-106. (Study Group on Asian Tax Administration and Research, hereinafter cited as SAGTAR).
- 36) ITS, p. J-11.
- 37) Commerce Clearing House — *Income Taxes Worldwide*, pp. 24-28. (This loose-leaf service of CCH has been recently discontinued).
- 38) See generally SAGTAR, *supra*, note 35.
- 39) Asian Taxes at p. Japan-116.
- 40) *Id.* at pp. Japan-116-138.
- 41) *Id.* at pp. Japan-119-124.
- 42) Coleman at p. 254
- 43) Asian Taxes at p. Japan-117.
- 44) *Id.*
- 45) *Id.* at p. Japan-118.
- 46) Coleman at p. 255.
- 47) Asian Taxes at p. Japan-119 (capital gains will get separate treatment *infra*).
- 48) *Id.*
- 49) *Id.*
- 50) Coleman, at p. 255.
- 51) *Id.*
- 52) ITS, p. J-7.
- 53) *Id.*, (buse see recent changes *infra*).
- 54) *Id.* p. J-11-13.
- 55) *Id.* (it is important to note that the 5 year holding period has been changed to 10 years with respect to real property); See 36 Bulletin I.F.D. 129 (1982).
- 56) ITS at p. J-11.
- 57) Coleman at pp. 264-267. (Special rules relating to exchanges, etc. are also discussed at pp. 268-270.)
- 58) See Sato article *supra* note 32; see also *Tax Incentives for Private Investment in Developing Countries*, ed. by R. Anthoine, Kluwer, The Netherlands, 1979, pp. 113-139.
- 59) SAGTAR at pp. 342-349.
- 60) *Id.*
- 61) *Id.*
- 62) Sato article note 32 *supra*.
- 63) See *Income Taxes Worldwide*, *supra* note 37, at p. 2.
- 64) The Tax Committee (sometimes referred to as the "Tax Commission" or "Tax Council") is an advisory body which advises the Prime Minister on tax matters. It is composed of 30 members representing business and trade unions and also includes scholars, journalists and economists. It was established in 1956 and has almost annually submitted recommendations to the Japanese government.
- 65) Miura article, *supra* note 32 at p. 168.
- 66) Makoto Miura, *Japan: The 1979 Tax Reform — Paving the Way for a New Tax*, 33 Bulletin I.F.D. 390 (1979).
- 67) Miura article *supra* note 32 at p. 169.
- 68) *Id.*
- 69) Miura article *supra* note 66 at p. 390.
- 70) Miura article *supra* note 66 at p. 390.
- 71) *Id.*
- 72) *Id.*
- 73) Miura article *supra* note 32 at p. 172.
- 74) See Miura article *supra* note 66.
- 75) See *Id.*
- 76) See *Id.* *See *Japan: Budget 1982-1983*, 36 Bulletin I.F.D. 129 (1982).
- 77) *Id.*
- 78) See *Id.* p. 394.
- 79) Miura, *Japan, Medium Term Tax Policy and the Tax Increase in Fiscal Year 1981*, 35 Bulletin I.F.D. 199 (1981).
- 80) *Id.*
- 81) See *Id.*
- 82) *Id.*
- 83) See *Id.*



Practical Problems and Dangers for the General Practitioner in Tax Matters

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For the general practitioner the tax problems of his clients present both a challenge and a danger. The client he represents in a divorce case, in the incorporation of a business, or in the drafting of a will or trust may look to the lawyer as an expert as to all of the legal ramifications of the representation, but in fact most general practitioners have little in-depth knowledge of the Internal Revenue Code, the regulations, or the court decisions and are sometimes unable to see the hidden dangers to the client from a tax perspective.

This is not to suggest that the general practitioner should never handle any matter having tax consequences. If a lawyer refuses to handle any matter with tax implications he or she would simply no longer be able to practice law. But these considerations do suggest that the general practitioner ought to take some practical and common sense steps to reduce the danger both to his client and to himself.

Associate a Tax Specialist for any Matter Requiring Tax Expertise beyond the Practitioner's Ability.

The standards of professional responsibility require that a lawyer should not handle a matter he is "not competent to handle, without associating with him a

lawyer who is competent to handle it."¹ The new American Bar Association Model Rules of Professional Conduct require that a lawyer "shall provide competent representation to a client."² The official comments to the Model Rules state that the "relevant factors" in determining competence "include the relative complexity and specialized nature of the matter... and whether it is feasible to refer the matter to, or associate with or consult with, a lawyer of established competence in the field in question."³

The general practitioner should be able to determine from his or her experience, if not from common sense, when a tax matter is so complex as to require that he or she refer it to a tax specialist:

EXAMPLE NO. 1.

Your client, for whom you provide a general range of services, receives a notice of a field audit, a compliance audit, a net worth reconstruction of income, or an audit involving a special agent.

In this example the general practitioner should certainly consult with a tax specialist. The general practitioner is not likely to have a detailed grasp of the issues involved, or he may not be able to properly evaluate the danger to the client in these situations. Do not rely on the client's accountant, but seek the advice of competent tax counsel.

A different situation is that involving a simple request for documentation from the revenue service, which a general practitioner could adequately handle. Thus, the client who was asked to provide documentation of his medical bills for a given tax year might be assisted in preparing the receipts.

Many general practitioners do not like to refer clients to other lawyers, especially clients of long standing. Associating a tax specialist does not require a referral of the client to the specialist. Certainly the applicable standards of legal ethics, the practice of the bar, or the evolving standards for legal malpractice do not

require the general practitioner to simply turn over his client to the specialist. From the viewpoint of both the general practitioner and the client, it may be best to simply consult the specialist and retain his or her services for the resolution of the specific tax matter. Certainly the general practitioner must choose the associated tax specialist with great care, because there is at least potential legal malpractice liability for careless reference of a client to a specialist who in fact is not competent to handle the matter. Since the association of tax counsel will increase the total cost of legal fees to the client, and because the client has a right to know who was representing him, the need for such consultation and the choice of the consulted specialist should be discussed with the client and his approval obtained.

EXAMPLE NO. 2

You are a lawyer in general practice. You undertook to represent a client in a divorce case. One of the issues in the divorce negotiations involved the disposal of accrued benefits in a pension plan under your state property division statute.⁴ Another issue is the proposal of the opposing attorney that your client turn over title to some real estate to your client's wife, in return for concessions on support.⁵ You are aware that this may be a taxable event for your client, but are not sure of the full tax implications. You consult an attorney specializing in tax law. You did not advise your client about this. The tax specialist examined the questions you presented, provided you with his analysis, and sent you a bill. Since you agreed to represent the client in the divorce case for a flat fee of \$2,000 you are not sure what you should do about the tax specialist's bill.

In Example No. 2 you clearly should have advised the client about the need to consult with a tax specialist, explaining that it would be in his best interest to minimize adverse tax consequences, and that it is your best professional judg-

ment that retaining the tax specialist may save the client a good deal of money. Since you have not done that, you may have to pay the tax specialist out of your own fee if the client insists that he will not pay the bill sent to you by the tax specialist.

Clearly the best situation is to develop an ongoing relationship with a tax specialist, with whom you can associate whenever it is necessary, and with whom you have a standing agreement with regard to payment for services.

As to any legal Transaction you handle Always Ask Yourself If There Are Hidden Tax Consequences.

Many of the hidden dangers for the general practitioner can be reduced if you are alert to potential tax consequences which are not obvious. If you undertake to do something, always make a mental note of whether you should investigate the tax aspects of the transaction.

EXAMPLE NO. 3

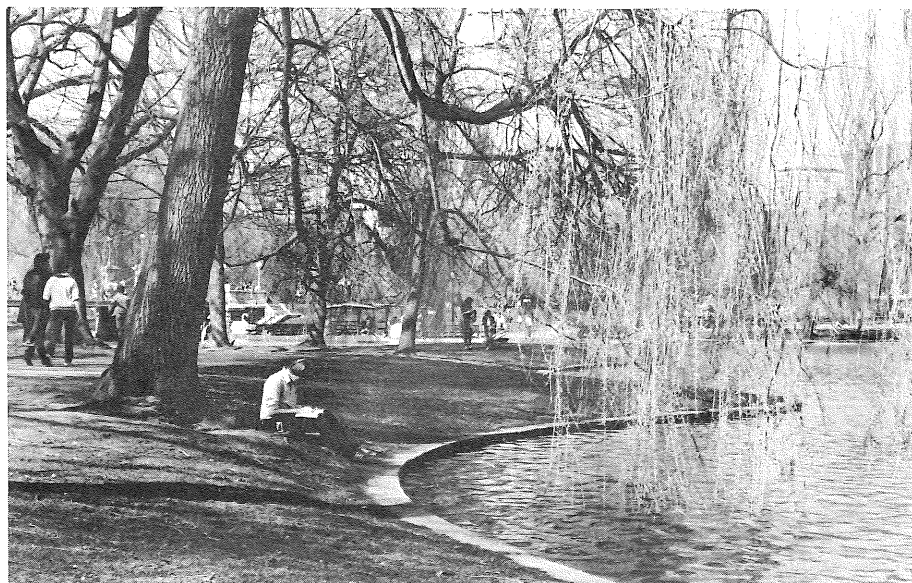
A lawyer undertook to draft a Clifford Trust at the request of his client. The lawyer was a general practitioner, and had little knowledge of the details of tax law. When the Internal Revenue Service later took the position that the trust was invalid, the Service sent the client a substantial bill for taxes due. The client had not been warned of this danger, and sued his lawyer for legal malpractice.

In one reported case involving similar facts to Example No. 3, a California court ruled that the client could sue his lawyer.⁶ If a general practitioner undertakes to render legal services in an area involving specialized legal services he can be held to the standard of a specialist rather than the standard of a general practitioner. Since the lawyer in Example No. 3 undertook to render services exposing the client to substantial tax liability without having the necessary expertise to foresee such danger, he can be sued for legal malpractice. The court approved a jury instruction that a general practitioner has a duty to refer to, or associate with, a tax specialist in circumstances in which a reasonably prudent lawyer would do so.⁷

The general practitioner should be alert and use common sense in any matter in which there are potential substantial tax consequences. If your educated guess is that the client's potential tax exposure is great, examine the problem carefully in light of the possible need to associate tax counsel or to exercise extreme care if you proceed on your own. *Be Alert to the Danger That a Client May be Using You to Accomplish Fraudulent Acts in Violation of the Tax Law.*

this is a confidential communication and you are bound to preserve that confidence.⁸ Thus, if a client tells you he has not been reporting income on past returns, you are obligated to keep that matter confidential. You may certainly advise him in the strongest possible terms that it would be in his best interest to file amended returns, if that appears to you to be the appropriate circumstances.

If a client informs you, as for example in the context of a divorce case, that he



A number of situations give rise to the need for great caution, combined with a skepticism and a sense of self-protection in dealing with a client who comes to you for assistance in circumstances suggesting illegality. If this is a client of long-standing, for whom you render other legal services, you may be reluctant to turn him away or to offend him. Nevertheless, your own self-protection as well as the ethical duties of a lawyer may require you to give the client some strong advice and perhaps even to decline to assist him if he refuses to follow this advice.

You should start from a basis of the applicable standards of professional responsibility. When a client tells you about his past activities, even illegal acts,

intends to underreport his income, then clearly the client intends to commit a future crime. Under the Code of Professional Responsibility the lawyer *may* report the client to the revenue authorities, but he is not obligated to do so.⁹ However, if the new American Bar Association Model Rules of Professional Conduct are adopted, the lawyer may not breach the client's confidence about his intent to evade taxes.¹⁰

A lawyer is prohibited from counseling a client to engage in criminal or fraudulent conduct.¹¹ Thus, a lawyer should not advise the client to invest in a tax shelter scheme which purports to generate tax benefits through the use of exaggerated evaluation of assets. The lawyer may, of course, discuss the legal consequences of a client's proposed

course of conduct or make a good faith effort with the client to determine the validity, scope, meaning or application of law.¹²

EXAMPLE NO. 4

You are a general practitioner representing a client in a divorce case. The client informs you that he has unreported income for the last three years which has been deposited in a foreign bank account. The client tells you his spouse is aware of this, and will probably threaten to inform the Internal Revenue Service unless she receives a generous property settlement.

Your best advice to the client in Example No. 4 is to file amended returns and report the income. The client should also file I.R.S. forms relating to foreign bank accounts. The client will certainly dislike this advice. However, from his point of view it is the only sensible solution to the problem. You do not want to negotiate or to try a contested divorce case with the threat of revelation of the hidden assets looming over the case. The danger that your client may be tempted to testify falsely at a deposition or at trial is very real in such circumstances, creating problems both for the client and for you as the attorney.¹³

Negotiation with the wife's lawyer based on a proposed deal to "buy" her silence will place both lawyers in a compromising situation.

EXAMPLE NO. 5

You are a general practitioner representing a client in a criminal case. In discussing your fee the client tells you that even though he has been unemployed for three years, and has no reported income for those years, he has collected a substantial amount of money which he keeps in a safe deposit box. He tells you that this money was never reported as income. He wishes to use some of this money to pay your fee, and also to purchase property for his children.

You should not assist the client in "breaking out" this unreported income which has most likely been obtained by illegal activities. Certainly you should not take possession of any portion of this sum.

EXAMPLE NO. 6

A client, whom you have previously represented in a conveyancing transaction and in some business planning, asks you to provide legal services in regard to estate planning for him. He tells you that he has \$50,000 in a joint safe deposit box in the name of himself and his wife. He tells you that in the event of the death of either husband or wife, the survivor will promptly remove the money from the bank. He doesn't want you to consider the money in terms of his estate planning, and he wants to keep it separate from his estate assets.

The lawyer should absolutely refuse to participate in or aid in any scheme to withhold assets from the estate inventory.

EXAMPLE NO. 7

You are the administrator of an estate, and you have learned that the surviving spouse of the deceased removed \$100,000 belonging to the deceased from a safe deposit box after his death.

Clearly you should not put yourself in a position where you are consenting to the

secreting of estate assets. File Form 706. *Be Alert to Potential Conflict of Interest in Making Tax Decisions.*

To what extent can a fiduciary of an estate resolve tax issues, disputes or questions in favor of the government and against the estate in order to reduce his or her own exposure to personal liability if all assets are distributed and tax liabilities are imposed?

EXAMPLE NO. 8

You are an executor.

If there is a suspected income tax liability of a decedent, and there may not be sufficient assets to cover it if an intended distribution is made, you face potential personal liability for paying out a legacy (a "debt") where there are taxes due to the United States. If you pay the potential tax liability in full by a generous compromise in favor of the United States, you insulate yourself from personal tax liability, but at the expense of the estate. On the other hand, you expose yourself to potential personal tax liability by making a distribution of estate assets. There is another aspect to this dilemma. To what ex-



tent can you use estate assets to contest tax liability to the last penny. You would remove doubt as to the tax liability one way or the other, and thereby avoid potential personal liability, but would expose the estate to heavy fees, especially as to fees and costs beyond any tax benefit from deductions, because the potential deductions exceed any tax benefits since it is so large relative to the size of the estate.

If You Are a Fiduciary, Be Sure That You File the Necessary Returns

This may seem to be an obvious proposition. But apparently some practitioners who do occasional estate work, and serve as a personal representative, have failed to follow this simple rule. There is a requirement that an estate income tax is due from every estate with any taxable income in a taxable year in excess of \$600 under §6012 (a) (3) of the Internal Revenue Code. The fiduciary is required to make the return. If the income is distributed to the beneficiaries, they are taxable on the distribution up to their pro rata share of the estate's distributable net income.

¹Code of Professional Responsibility, Disciplinary Rule 6-101, Mass. S.J.C. Rul. 3:07.

²Model Rules of Professional Conduct, Rule 1.1.

³Model Rules of Professional Conduct, Rule 1.1-Comment.

⁴See *Shesky v. Sheskey*, 16 Mass. App. Ct. 159 (1983) in which the court vacated an allocation to the wife of a share in the husband's pension under M.G.L. c. 208, S34 because the trial judge failed to take into account the substantial tax consequences to the husband.

⁵The 1984 tax act substantially altered prim rules regarding conveyances of property between spouses, effectively repealing *United States v. Davis*, 370 U.S. 65 (1962). The 1984 legislation also made significant change in the tax treatment of alimony.

As to any legal Transaction you handle Always Ask Yourself If There Are Hidden Tax Consequences.

Many of the hidden dangers for the general practitioner can be reduced if you are alert to potential tax consequences which are not obvious. If you undertake to do something, always make a mental note of whether you should in-

vestigate the tax aspects of the transaction.

⁶*Horne v. Pechham*, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1979) [opinion withdrawn from publication by order of the court].

⁷California has a Bar-certified tax specialist program, but the opinion of the court did not turn on that issue.

⁸Code of Professional Responsibility, Disciplinary Rule 4-101; Model Rules of Professional Conduct, Rule 1.6.

⁹Disciplinary Rule 4-101 (C) (3), A.B.A. Opinion 202 (1940).

¹⁰Model Rules of Professional Conduct, Rule 1.6 requires the lawyer to reveal confidential information only if it is necessary to prevent a crime or is likely to result in death or substantial bodily harm.

¹¹Code of Professional Responsibility Disciplinary Rule 1-102

¹²Model Rules of Professional Conduct Rule 1.2(d).

¹³See Code of Professional Responsibility 7-102(B) requiring revelation of known perjury. A few states, such as Massachusetts, do not require revelation of a client's perjury when the lawyer's knowledge of it comes from a confidential communication.



Hishon v. King and Spaulding: Civil Rights or Commercial Freedom of Association

By Jason Zorfas

Jason Zorfas, a third year law student at Suffolk University Law School is the business editor of *The Advocate*.

'It is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices, including race.' *Bell v. Maryland*, 378 US 313 (1964)

Hishon v. King and Spaulding: Civil Rights or Commercial Freedom of Association

In 1964 Congress passed important civil rights legislation aimed at discouraging, if not eliminating racial, ethnic, sexual and religious discrimination in the marketplace. Since its existence, the courts have been tormented by a multitude of cases in which they have been called upon to determine the extent of the act's jurisdictional basis. The legislative history of the act offered little, if any, clarification concerning who was to be subject to the provisions of the act.

Now, nearly twenty years later the controversy continues.

Elizabeth Anderson Hishon filed a Title VII action¹ alleging sex discrimination in the employment practices of King and Spaulding, a prestigious southern law firm who had employed former Attorney General Griffin Bell and Jack Watson, White House Chief of Staff under the Carter Administration. The firm is a large general partnership consisting of approximately fifty lawyers and who employs another fifty lawyers as associates. Ms. Antha Mulkey, an honor graduate of the University of Georgia Law School was the first woman employed by King and Spaulding as an

associate in 1944. She was the firm's only permanent associate for thirty-three years while more than fifty men who were her juniors were promoted into the partnership. A 1982 survey of one hundred and fifty-one law firms stated that in June of 1982, King and Spaulding had only one woman partner and no black or Hispanic partners.² Although women represented more than thirty percent of those graduating from law school in 1980 only seven (thirteen percent) of King and Spaulding's fifty-three associates were women.³

In 1972, Ms. Hishon, a Columbia Law School graduate, became an associate with King and Spaulding. It was the policy at the time Ms. Hishon became associate that at the end of six years an associate was considered for partnership.

"... King and Spaulding had only one woman partners and no black or Hispanic partners."

Ms. Hishon brought a sex discrimination suit under Title VII in the United States District Court of Georgia which dismissed her claim holding that King and Spaulding is a law firm partnership and therefore a "voluntary association" and as such, not within the purview of Title VII.⁴ The United States Court of Appeals affirmed,⁵ and the Supreme Court granted certiorari to review the question of whether a "voluntary association" of individuals established for the purpose of operating a business in order to make a profit is within the jurisdictional parameters of Title VII.

The Commerce Clause

The Commerce Clause is the constitutional source of power of Congress to enact civil rights legislation regulating

the employment practices of the business sector in the marketplace. The commerce power is not solely concerned with the regulation of commerce per se — the physical movement of goods across state lines — , but rather, the power is exercisable upon the finding that any arguable connection exists between the regulation and commerce. As a result, the motives of Congress do not have to be narrowly commercial due to the illimitable nature of the commerce power. More specifically, civil rights legislation can withstand judicial scrutiny where there is (1) a rational basis for finding that discrimination in the regulated businesses effects commerce and (2) if such a basis existed, whether the means that Congress selected to eliminate the evil are reasonable and appropriate.⁶ Therefore, almost every economic activity may be said to effect commerce in some fashion so as to come within the ambit of Congress' commerce power. For example, in *Katzbach v. McClung*, 379 US 294 (1964), the Supreme Court upheld the application of Title II of the Civil Rights Act of 1964 to a small local restaurant that purchased meat from another company who obtained its supply from out of state sources. Under this approach, it is irrelevant that a Congressional act was developed as a means to a social or moral end rather than to satisfy a commercial objective.

The express reliance upon the Commerce Clause granting Congress the power to regulate anything remotely related to interstate commerce avoids the issue of whether Congress is constrained by the state action doctrine in order to enforce the Equal Protection Clause of the Fourteenth Amendment. However, the question becomes academic by virtue of the power vested in the Congress by the Commerce Clause. As a result, Congress may extend the civil rights guaranteed in the Equal Protection Clause beyond the realm of state action into virtually all economic activity.

Treated As A Corporation?

A corporation is unequivocally within the sphere of Title VII's jurisdiction. Hishon argues that King and Spaulding is in substance a corporation despite its classification as a partnership and thus subject to the provisions of Title VII.

Hishon attempted to show that King and Spaulding had all the attributes of a corporation including, a perpetual existence, a trade name which is not the name of any of its living partners, centralized management and control by a committee that is the equivalent of a corporate board of directors, and a limitation on each partner's ownership interest in the assets of the firm to the amount of his capital account.⁷ Moreover, Hishon points out that the state law of Georgia permits a partnership to be sued in the partnership's name and that King and Spaulding itself held out to third parties that it is an entity with an independent institutional identity. Therefore, Hishon concludes that the economic reality of the matter is that King and Spaulding is a large, impersonal, highly standardized enterprise of perpetual duration as altered by its partnership agreement and as such, a corporation.

Both the trial and appellate courts found King and Spaulding's arguments more persuasive. While noting that a large partnership possesses many of the attributes common to the corporate form of business, the courts found no merit in the argument that by altering and clarifying the internal structure of the partnership it had "unbeknownst to itself incorporated its partnership."⁸ In short, the courts have so far refused to go beyond the common law definition of a partnership and follow Hishon's argument that a large partnership is so closely akin to a corporation that it must be treated accordingly under Title VII.

Freedom of Association

Since the inception of free society, associational affiliations have been manifest for the purpose of furthering ideas. These associations have spanned the spectrum from religious, political, social and cultural groups to economic associations formed for making profit. In United States, it has been the foundation of our multifarious society. As de Tocqueville stated, "The most natural privilege of man next to the right of acting for himself is that of combining his

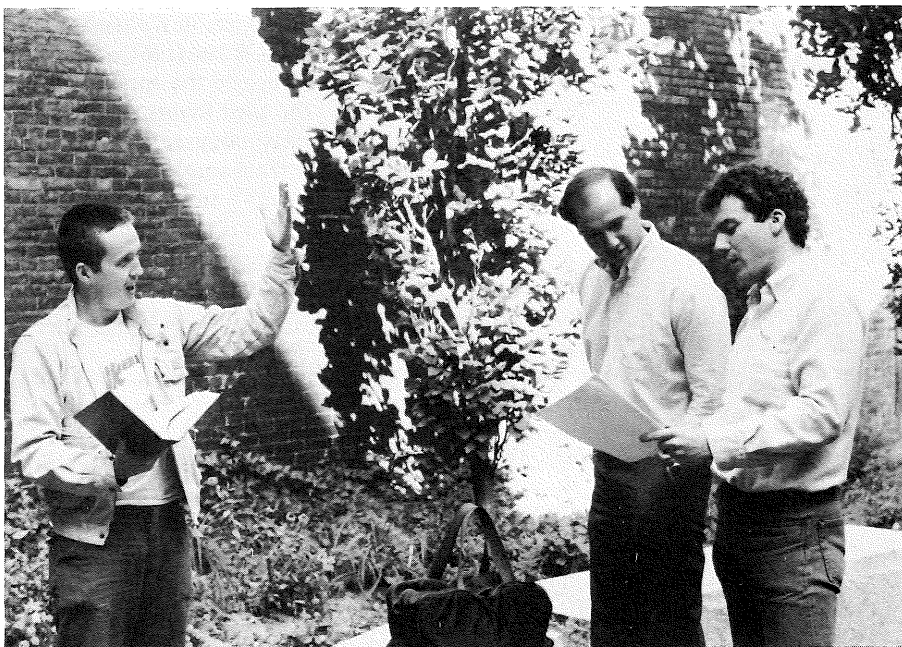
exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty."⁹

The right of association has its original legal basis in the law of contract. The freedom to meet with others in voluntary associations in order to foster contractual relationships between its members is derived from the freedom to contract. However, while there is no provision in the Constitution specifically protecting the freedom of association, the Supreme Court has recognized its basis in the Constitution.¹⁰ The freedom of speech protected under the First Amendment establishes a right of association.¹¹ King and Spaulding contend that this First Amendment guarantee covers commercial speech and therefore extends to protect the right of commercial association.

The District Court accepted King and Spaulding's freedom of association argument and analogized a partnership to a marriage and the application of Title VII to a shotgun wedding:

"Just as in marriage different brides bring different qualities into the union — some beauty, some money, and some character — so also in professional partnerships, new mates or partners are sought and betrothed for different reasons and to serve different needs of the partnership...Unfortunately, however, in partnerships, as in matrimony, these needed, worthy and desirable qualities are not necessarily divided evenly among the applicants according to race, age, sex or religion, and in some they just are not present at all. To use or apply Title VII to coerce a mismatched or unwanted partnership too closely resembles a statute for the enforcement of shotgun weddings."¹²

The Court of Appeals, however, refrained from expressly endorsing the freedom of association argument, but neither was it persuaded by the case relied upon by Hishon. In *Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123 (S.D.N.Y. 1977), an attorney was allegedly dismissed from a law partnership on the basis of his ethnic



background. The court held that the application of Title VII to employment discrimination in a partnership "does not infringe upon any First Amendment right of privacy or freedom of association of its members."¹³ The court reasoned that the First Amendment right to associate is to protect fraternal, political and social associations and not organizations devoted to making profit.¹⁴

The question that remains to be resolved is whether the right of free association is limited solely to groups dedicated to particular beliefs and goals such as political, religious and cultural ideas or does it extend to include the profit oriented association?

The Dilemma

The enactment of Title VII has significantly contributed to the more equitable treatment of women in the employment practices of law firms. In 1964, only 3.8 percent of the total number of lawyers and judges were women.¹⁵ By 1982, a survey of one hundred and fifty-one of the largest law firms revealed that 17 percent of the lawyers at large firms were women while the overall percentage of female attorneys was only 14 percent.¹⁶

This trend towards the elimination of sex discrimination as well as the elimination of discrimination in general now faces a very real obstacle. In her brief to the Supreme Court, Hishon viewed the dilemma as follows, "if the court finds that the case is covered by Title VII the defendant's constitutional right to freedom of association is then thrown into head-on conflict with plaintiff's constitutional right not to suffer discrimination..."¹⁷

Freedom of association, like any other constitutional right, is not an absolute guarantee. These associations are subject to reasonable governmental restrictions enacted by the legislature in order to protect the members of the association and the general public. How far the legislature may go and for what purpose remains an open question. Here, Title VII seeks to protect various people from unjustified discrimination and as a result directly competes with the right of business to operate free from unwarranted government interference.

The Supreme Court Decision

The Supreme Court in May of this year came down with its decision. The Court held that a private partnership is unequivocally within the ambit of Title VII's jurisdiction since 'nothing in the statute or legislative history would support a per se exemption'.¹⁸ In fact, the statute expressly includes a partnership. The statute defines an 'employer' as a 'person engaged in an industry affecting commerce who has fifteen or more calendar weeks in the current or preceding calendar year; 42 USC § 2000 E (b), and a 'person' is explicitly defined to include 'partnerships', 42 USC § 2000 E (a).¹⁹ In effect, the Court reasoned that a plain interpretation of the statute mandates the inclusion of partnerships within the act's jurisdictional base.

"The Court held that a private partnership is unequivocally within the ambit of Title VII's jurisdiction ..."

For a class of employers to be exempt, Congress must expressly provide for such immunity.²⁰ For example: 42 USC § 2000E (b) (1) exempts Indian Tribes and certain agencies of the District of Columbia; § 2000 E (b) (2) exempts small businesses and bona fide membership clubs; and § 2000E - 1 exempts certain employees of religious organizations.

In addition, the Court expressly rejected King and Spaulding's argument that the application of Title VII in this instance would violate its constitutional rights of free expression or association as derived from the First Amendment. The Court recognized that lawyers play a distinct role in stimulating the 'beliefs and ideas of our society,' but failed to see how King and Spaulding's ability to 'fulfill such a function would be inhibited by a requirement that it consider Hishon for partnership on her merits.'²¹ The court conceded that, 'invidious private discrimination may be characterized as a form of exercising

"... invidious private discrimination ... has never been accorded affirmative constitutional protection.'"

freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protection."²² In the past the Court has refused to accord discrimination in the selection of who may attend a private school or who may join a labor union within those First Amendment protections.²³ The enforcement of antidiscrimination laws have associated with it 'costs to other values including constitutional Rights', but in the balancing scheme, the anti-discrimination laws take priority over the resulting impediments the exercise of such laws have on 'personal judgment in choosing one's associates or colleagues.'²⁴

In an effort to narrow the Court's opinion, Justice Powell concurred with the majority that Hishon was entitled to prove the averments concerning King and Spaulding's promise to consider her for partnership status. The foundational basis of a partnership is the 'common conduct of a shared enterprise.'²⁵ This relationship between partners is not a characteristic of the 'employment' relationship to which Title VII would apply.²⁶ Justice Powell distinguished the relationship between the partners and that of employer and employee. Therefore, participation in profits, work assignments, approval of commitments to bar associations, civic and political activities, questions of billing, acceptance of new clients, questions of conflicts of interest, retirement programs and expansion policies are all examples of sensitive decisions that are to be made solely by the partners and are as such outside of the boundaries of Title VII.²⁷

Conclusion

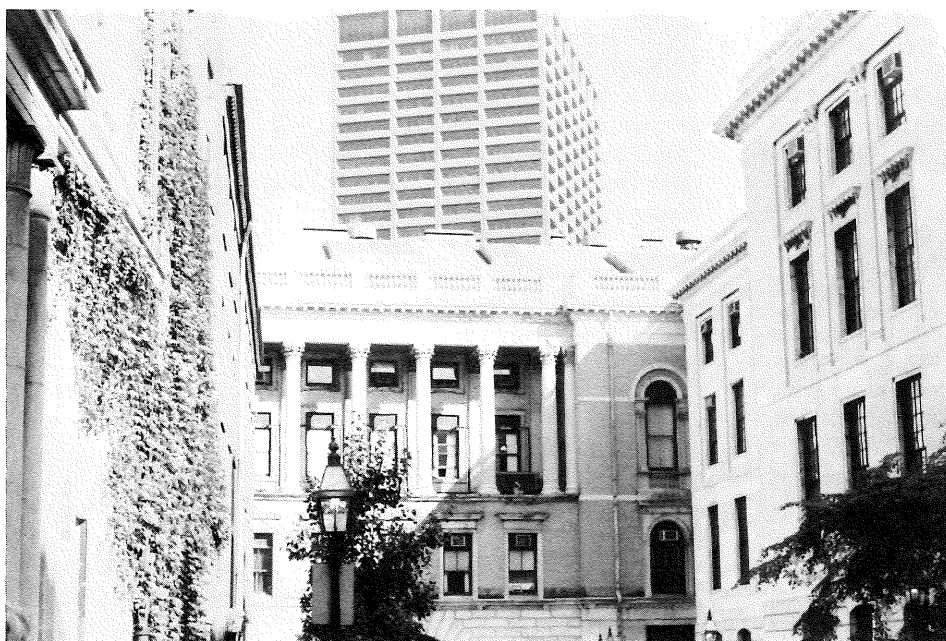
The impact of this recent decision of the Supreme Court on civil rights actions is to render the considerations of race and sex totally irrelevant in the admissions process of partnerships in offering employees the opportunity to become a partner. As Justice Powell stated in his concurrence,

**“Elizabeth Anderson
Hishon will now have her
day in court . . .”**

“The qualities of mind, capacity to reason logically, ability to work under pressure, leadership and the like are unrelated to race or sex. This is demonstrated by the success of women and minorities in law schools, in the practice of law, on the bench, and in positions of the community, state and national leadership. Law firms — and, of course, society — are the better for these changes.”²⁸

Elizabeth Anderson Hishon will now have her day in court to prove the substance of her allegations. The case is remanded in order to determine whether declaratory and injunctive relief, back pay and compensatory damages are due her in lieu of reinstatement and promotion to partnership.

- 1) Civil Rights Act of 1964, s. 701 et seq. as amended 42 U.S.C.A. s. 2000e et seq.
- 2) Brief for Petitioner in the Supreme Court of the United States, *Hishon v. King & Spaulding*, No. 82-940, October Term 1982, at 22 (*quoting* Flaherty, *Women & Minorities: The Gains*, National Law Journal, December 20, 1982, at 1, 8-11).
- 3) *Id.* at 23 (*quoting* Statistical Abstract, 168, Table 279).
- 4) *Hishon v. King & Spaulding*, 24 Fair Empl. Prac. Cas. (BNA) 1303 (N.D. Ga 1980).
- 5) *Hishon v. King & Spaulding*, 678 F 2d 1022, (11th Cir. 1982).
- 6) *Heart of Atlanta Motel Inc. v. United States*, 379 US 241 (1964).
- 7) Brief for Petitioner at 33.
- 8) *Hishon*, 678 F 2d at 1026.
- 9) I de Tocqueville, *Democracy in America*, 203 (Bradley, ed., 1945).
- 10) *National Association for the Advancement of Colored People v. Alabama*, 357 US 449 (1958).
- 11) *Id.* at 460.
- 12) *Hishon*, 25 Empl. Prac. (CCH) s. 31,703, at 20,062 (R. 266; App. A-20).
- 13) *Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123, 128 (S.D. New York 1977).
- 14) *Id.*
- 15) Brief for Petitioner at 21 (*quoting* Statistical Abstract, 388, Table 651).
- 16) Brief for Respondent in the Supreme Court of the United States, *Hishon v. King & Spaulding*, No 82-940, October Term 1982, at 33 (*quoting* Flaherty, *Women & Minorities: The Gains*, Nat'l L.J., Dec. 20, 1982, 1, col. 1, at 8, col. 1).
- 17) Brief for Petitioner at 8.
- 18) *Hishon v. King & Spaulding*, 52 LW 4627, 4629 (May 22, 1984)
- 19) *Id.* at 4628 footnote 3
- 20) *Id.* at 4630
- 21) *Id.*
- 22) *Id.*
- 23) *Id.* (*citing* *Runyon v. McCrary*, 460 U.S. 160 (1976); *Railway Mail Association v. Corsi*, 326 U.S. 88, 93-94 (1945))
- 24) *Id.* footnote 4
- 25) *Id.* at 4630
- 26) *Id.*
- 27) *Id.*
- 28) *Id.*



Book Reviews

Professor Stephen Hicks

The Western Idea of Law,
J.C. Smith and D.N.
Weisstub,(Butterworths 1983)

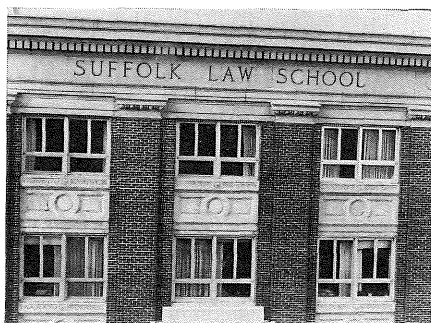
The Western Idea of Law is a book about the nature of law, comparatively, historically and philosophically. It takes the form of a book of materials for a course on the Western Idea of Law. It has four chapters, sixteen sections, 650+ pages, a very full and clear index to people, places, times and concepts and it is very nicely printed and bound. Even without regard to its substance, the authors and publishers have produced a fine and useful example of a difficult genre. A book of materials necessarily imposes restrictions on what can be said for even though it is possible to find statements or points of view on virtually anything, *yet their order*, significance and overall coherence have to be found in the materials themselves. At the same time, a book of materials leaves one free to make comment through contrast or one's choices for opening and concluding statements. In this way, although it is not like writing a novel or a philosophical treatise, one can be very creative and original, as in a course of lectures. This book, *The Western Idea of Law*, gives such a commentary on modern society through the exposition of Law and Culture, The Mythological Origins of Law, The Foundations of Western Law and Law and State. The authors introduce each of these four chapters and their sections with brief discussions of the issues of modern legal theory so that by the end of the book one has read an essay composed in parts as well as having considered the world's problems and learned half an encyclopedia's worth of knowledge from a hundred authors. Without a doubt most of the edited selections would be beyond the horizon of study of most teachers let alone students and for that reason alone

a fascinating collage of ideas builds up what is a genuine introduction to our tradition of law and a marvelously rich source of learning. But what makes this book outstanding is that substantively the authors have exposed aspects, qualities, and realities to law from certain critical perspectives which they define that no one else in legal theory seems much concerned with. Moreover, in a very real sense their search for western law's roots in culture and society is very timely and relevant.¹ While the critical analysis of liberal democracy and legal theory takes a philosophical and historical approach, what underlies the authors' approach is the comparative method.² It is in fact their grand and large overview of law and its relationship to culture and society that transcends the historical and philosophical interpretations of the usual western idea of law. They use comparative law in a loose sense not so much to reveal other types of law, not for the comparison itself, but for what it might illuminate that is essential to our own law. In this way socialist law is introduced for its alternative concepts of property and the state, and religious legal systems compared for their fully spiritual sense of law. Thus, one could expand on their other references to primitive and ancient legal systems and use this book as a text for a general comparative legal systems course as well as an introduction to legal theory or legal history.

In fact the authors claim that law has become depersonalized, isolated from myth and rationalized and even that lawyers have no theory about what they do (p.x.). Their central concern is with the tension between the western idea of law's Judeo-Christian and Greco-Roman roots, that is, its individualization and its universalizability (p. 195). They approach the significance of this tension from a very human and personal point of view: for example, one of the introductory sections in Chapter Four, Law and State, called Constitutional

Authority and the Rule of Law ends, as do most of their commentaries, with a pointed observation to the effect that for an individual the rule of law or the rule of the state does make a difference (p. 399). Apart from such political characteristics of western law they also emphasize its patriarchal (p. 174) and its rational aspects (p. 317). At the same time we are not told how the law, society and people reflect, represent or respond to each other, nor do the authors offer much beyond a framework of tensions, such as autonomy and community, which is refined and specified as one progresses through the book. But perhaps that is the very creative and personal task left to the reader, as it should be in a teaching medium. They show us what there is beneath the tradition we think we know so well though they leave the reader free to formulate its present crisis. Their final thought is to wonder whether we are condemned to our fate or might law participate in new forms of consciousness while not forgetting the lessons of history (p. 552). Thus they implicate a theory of the nature of law when, for example, they say modern culture is out of touch with the dramatic modality of experiencing law (p. viii). It is a psychological theory of the need for drama and myth in the lives of citizens who live in the law (p.3). They call it a phenomenology of law, (p. viii), moreover, but in this respect we are left as uncertain of their methodology as of their theory, (p. 195, 243). Nevertheless, the reader is free to organize the materials into a private theory. This is especially so given the last section, Equality, Status and Liberty in the Industrial State, of Chapter Four, Law and State, for it ties together their themes with the particular problems of our day and age, such as the need for certain rules with the loss of community, and the role of the state as representative of society with the equality of women in society and law. The last chapter as a whole, makes an excellent starting point for the more obvious contemporary issues of legal theory such as

the relationship between law and morality or the nature of legal obligation. Were the book to be an introductory text for such a course, students would have a far more profound sense of the unity of *The Western Idea of Law* than can be gleaned from a library of law review articles assigned as background study.



Indeed, the more is published, the more uprooted does contemporary thought seem to be from its actual experiential context, not to mention as the authors do, from its preconscious roots (p.xi). In their desire to return the theory of law to its essential human responsibility not only is the authors' book original and creative it is quite unique. Eschewing the internecine squabbles of analysts and instrumentalists we come to see how narrow the road is that we travel today called legal theory and how much defined and protected its borders are. As the authors note, there is a moral gap between law and politics which contemporary legal theory seeks to bridge with a general theory of justice (p. 468). Yet the point is exactly that no amount of a shared legitimacy to law and politics can overcome the fact that the historically contingent interdependence of law and politics assumed by analysts and instrumentalists transforms law as it denies its interdependence with ethics. The authors' point is that to operate according to rational law flies in the face of deep

moral, political and emotional needs. It is here, however, that a critical theory is most needed for the historical process of the covering up of law's mythological roots and its philosophical significance for the way we make meaning out of our everyday lived experience demand that we put the priority of politics as the means of determining the whole into a historical perspective and relative place vis a vis ethics, religion and law. But it seems to me that it is from the political form of public experience that we need to withdraw, that political revolution is a contradiction in terms and that casting all criticism in the language of politics represents politics as the medium of all intersubjective sharing just as politics represents society. In fact it is exactly this dialectic that we have got upside down. It is society that is represented by politics as political society not political society that replaces society. Therefore to talk of political change merely reinforces that criticism based on interests, representation, and rights of citizens will only change what is represented and not either, let us say, the relationship of sign to signified or the sign itself. That is, it omits the existential way the law relates to ethics and religion as well as politics, and it does not describe the phenomenological beings whose existence engenders all this. The authors rightly perceive that our contemporary concern with the appearance of law in the world today as rules, systems, norms and processes obscures to a very great degree the depth with which we feel law as ritual, myth and poetry of human relations.³ The authors are right to emphasize that *The Western Idea of Law* is not just a political construct, a philosophical system or a historical accident but that underlying it all law is universally the way we experience order rather than generate welfare, discover transcendence or realize our authenticity.⁴ Law is profoundly social and personal. As personal, law is not wholly mine yet nor is it quite other to me. It shares mysteries with religion and precepts with morality. As social it has a much over-used political dimension to it through which we represent ourselves in the form of a political society absolving ourselves of the responsibility for certain social functions. The significance of this is that these two thousand years of *Western Idea of Law* can be seen as a whole and even finalized, if we accept the challenge of a new social order as critics claim, or new kinds of consciousness as the

authors claim (p. 352) or new ways of describing the experience of law, as I would claim. If this book becomes widely used in colleges and law schools then a new generation of thinkers may indeed at last turn their attention to the ultimate creative task remaining of society, to forge a theory of law for the twenty-first century, the space age, the nuclear age, the computer age. It is certain that the concerns of *The Western Idea of Law* are central to the profound changes we are witnessing in the world today. To be consistent in a comparative sense one ought to let International Law shed what light it can on this too, for we do stand in need of a coherent theory of the personal, social, political and ideal dimension of law. The authors do not go so far. Yet this book is a real contribution to the teaching of the possibilities inherent in law, because of its original emphasis on the individual's way of being in law from the point of view of the grand sweep of historical progress.

Footnotes

- 1) See, for example, H. Berman, *Law and Revolution* (Harvard 1983), A. Watson, *The Making of the Civil Law* (Harvard 1983).
- 2) C.f. R.M. Unger, *Law in Modern Society* (Free Press 1976).
- 3) "We can also say of other institutions that they have ceased to live when they show themselves incapable of carrying on a poetry of human relations, this is the call of each individual freedom to all others." Merleau-Ponty, *The Prose of the World*, xiii (Northwestern 1973).
- 4) I have fully discussed these ideas of the comparative perspective and field of study of society in Hicks, "The Jurisprudence of Comparative Legal Systems," 6 *Loyola of L.A. Int. Comp. L.J.* 83 (1983).

Deadly Force — The True Story of How a Badge Can Become a License to Kill

Anne W. Hulecki

Deadly Force

by Lawrence O'Donnell, Jr.

The story of how a badge can become a license to kill is more than a story of a corrupt bureaucracy. It is a commentary on the more deep-seeded corruption of racism. O'Donnell reveals an inbred, fiercely cultivated, and frighteningly unconscious corruption which is exhibited as casually as spray-painted obscenities or as reflexively as the trip of a trigger. It is a story of Boston and its separatism but it is also, unfortunately, a story of nationwide application.

On January 29, 1975, two Boston policemen from a special plainclothes unit allowed two local reporters to ride with them and observe their daily patrol. In the early evening, after an uneventful day, the officers spotted what they believed to be a robbery car, in a Black neighborhood. The officers carelessly misread the license number and followed the car. They approached with drawn guns, and in a confused confrontation, shot and killed the driver of the vehicle. Moments later, as backup patrols circled in and cameras flashed, one of the patrolmen turned to the passenger reporters and asked: "How's this for action? Did we put on a good show for you?" The dead driver of the suspect vehicle, James Bowden, was an innocent, unarmed Black man, a hospital worker with two children and no prior record. He was on his way home after visiting relatives.

Lawrence O'Donnell reconstructs the complex details of these events and of the civil suit brought by James Bowden's widow against the two patrolmen. As in a type of reverse suspense novel, O'Donnell peels away layer-by-layer, the complex cover up fabricated by police department officials. It seems this should be a clear case; we know who has committed the act and we can establish how and why. Yet, no case like this one against police officers had ever been won. Unconscious racism permeates the atmosphere around this split-second, carefully-considered mistake. The officers, in their blatant carelessness could

not have been more sure in their conclusions or more fearful in their approach. O'Donnell's revelations are startling. Police reports are altered so casually, routinely. The mundane becomes frightening.

The author lived through each moment of the investigation with his family's law firm which launched this impossible and spectacular three-year attack, at their own expense, to vindicate James Bowden's name and bring redress to his widow. Although Lawrence O'Donnell is the black sheep in this family of lawyers who chose to become a writer, his precise investigative style reveals his family heritage. His style is charged by reality and his precision leaves no room for doubt. Also in O'Donnell's blood is Boston. Its culture, dialects, and texture are second-nature to him. His prose is as crisp and ordinary as a local boy telling a story, allowing the bare fact to shine spectacularly. The book is peppered with such astute observations of the legal system as: "Nothing gums up the works of our judicial system like a trial."

Deadly Force is compassionate without sentimentalism, spectacular without artifice. Other recent lawyering books, *Absence of Malice* or *And Justice for All* seem tainted by theatricalism and do not approach O'Donnell's refreshing realism. This is a story of a real lawyer doing more than a lawyer's calling without self-righteousness. It is a story of the goals of justice and the inadequacies of the system.

The money award is not justice. No amount of money approaches justice, but the book does. These principles are exhibited in Lawrence O'Donnell, Sr.'s stoic humility, never celebrating a trial victory. He discreetly chose to avoid publicity before this trial, refusing to bring in the NAACP to avoid further harm to the widow and avoid political tainting. He won the trial on the merits. The revelations of *Deadly Force* extract the justice due to James Bowden's widow. It educates us in the social chaos resulting from powerful strains of racism and an ubridled bureaucracy.

Notes

Obituaries

Sidney Berkman (J.D. 1938) passed away in February of 1984. Mr. Berkman served his country in the judge advocate general's office of the Army Air Corps during World War II. He later served in the Massachusetts Air National Guard, retiring in 1965 with the rank of Colonel. In 1961, Mr. Berkman joined the firm of Widett and Widett (now Widett, Slater and Goldman), becoming eventually a partner and the head of the litigation department. He retired from the firm in 1977 and sat as a master and arbitrator on various cases. He was also past chairman of the Massachusetts Bar Association's Family Law Committee.

Jane O'Riordan (J.D. 1977) passed away in June of 1984 after a long bout with Cancer. She was assistant chief District Court prosecutor for the Suffolk County district attorney's office and a former public defender. Her peers in the legal community described her as an admirable advocate who would be missed in the courtroom and out.

Marcus Sherin (J.D. 1931) passed away in June, 1984. Before receiving his doctorate in jurisprudence from Suffolk, he was a Phi Beta Kappa graduate from Tufts University and a physics professor there and at Brown University. Mr. Sherin was an attorney in Boston for 40 years before retiring to Florida.

Samuel Slavin (J.D.) passed away in March, 1984. A graduate from Suffolk University Law School, he was a partner in the Tedwin Sportswear Co. in Boston for many years. He later became the office manager for Standard Auto Gears in Dorchester before his retirement in 1973.

William G. Day (J.D. 1941) passed away in March, 1984. Mr. Day was the valedictorian of his graduating class at Suffolk. He was a member of the Massachusetts Bar Association and also was a corporator of the former Charlestown Savings Bank and of the Suffolk Franklin Savings Bank. He was a long time director and attorney for the Reading Cooperative Bank.

Recent Faculty Publications

"The New Massachusetts Lemon Law" by Professor Joseph P. McEttrick, *Mass. Lawyers Weekly*, October 10, 1983, p. 21.

Supplements to *Massachusetts Pleading and Practice*, published by Matthew Bender & Co., New York. 7 volumes, by Professor Charles P. Kindregan, co-authored with Edward M. Swartz and Frederic A. Swartz (Fall, 1983). Professor Perlin's book (co-authored with J.M. Connors), *Civil Procedure in the Mass. District Courts* cited by the Supreme Judicial Court in *Walker v. Bd. of Appeals of Harwich*, 388 Mass. 42, 52, note 9 (1983).

The following original articles have been printed in Civil Rights Actions Under § 1983 for the Workshop on Section 1983 Sponsored by Suffolk University Law School:

- "1983 and the Constitution" by Professor Gerard J. Clark.
- "The Implications of *Parratt v. Taylor* for §1983 Litigation" by Professor Karen M. Blum.
- "A Comparison of Section 1983 Claims with Massachusetts Tort Remedies" by Professor Joseph M. Glannon.
- "Section 1983 Bibliography on the Civil Rights Act" by Law Librarians Janet Katz, Susan Sweetgall, Gale Lancaster, and Nancy Blakely, with the assistance of Jim Coleman, Reference Librarian of Suffolk University, Law student M. Crossen, and Professors Edward Bander, Gerard Clark and Joseph Glannon.

"Constitutional Law," William T. Corbett, 1981 *Annual Survey of Massachusetts Law* 279.

"The Implications of *Parratt v. Taylor* for Section 1983 claims" 16 *The Urban Lawyer*, No. 3(1984) by Prof. Karen Blum.

"Constitutional Basis for a Right of Access to Counsel at the Pre-Trial Stages of Drunk Driving Prosecutions: A Study in Conflicting Rights" by Prof. Russell Murphy, *Northern Illinois L. Rev.* (Spring 1984)

"The Jurisprudence of Comparative Legal Systems," 6 *Loyola Univ. of Los Angeles International and Comparative Law J.* 83 (1983) by Prof. Stephen Hicks.

"Non-Statutory Factors in Property Division in a Divorce Case," Winter 1983 *Massachusetts Law Review* 194 by Prof. Charles Kindregan.

The following original articles were printed in CURRENT PROBLEMS IN CONDOMINIUMS AND COOPERATIVES for the Workshop on Condominium Law sponsored by Suffolk University Law School:

"Condominium Documents and Annotations," by Profs. Barry Brown and Richard Perlmutter (with D. Tillitson and M. Davis).

"Cooperative Housing," by Prof. Richard Perlmutter.

"The Tenant Amidst the Condominium — Cooperative Conversion," by Prof. Bernard Keenan.

"Tax Problems of Condominium and Cooperative Real Estate Development," by Prof. John Sherman.

"Selected Governance Issues," by Prof. Barry Brown.

"Selected Bibliography on Condominiums," by Prof. Edward Bander and the Suffolk University Law Library Reference Staff.

"A revised version of this book on condominium law will be published by Butterworths."

Books:

DEAN'S LIST OF RECOMMENDED READING FOR PRE-LAW AND LAW STUDENTS by Professor Edward Bander, Introduction by Dean David Sargent (1984).

Supplements:

CUMULATIVE SUPPLEMENT TO FEDERAL CONTROL OF BUSINESS, LAWYERS CO-OPERATIVE PUBL. CO. (1984) by Prof. Austin Stickells.

C.L.E. Announcement:

Carol Dunn has been appointed Program Coordinator for the Continuing Legal Education programs at the Law School. Ms. Dunn formerly served as the coordinator for the Moot Court programs. She succeeds Gretchen E. Hynds as continuing legal education coordinator. Ms. Dunn will work under the direction of the faculty committee on continuing legal education.

New Faculty Appointments

Professor Nancy E. Dowd
Professor Steven J. Callahan
Professor Timothy Wilton

SUFFOLK UNIVERSITY LAW SCHOOL
1984 - 1985
CONTINUING LEGAL EDUCATION PROGRAMS
FOR PRACTICING LAWYERS

December 13, 1984:
(Thursday)

— *Recent Developments in the Law.*

Program of instruction

— includes 1984 Tax Legislation, Torts, Consumer Protection, Electronic Transfer of Funds, Law and Medicine, Business Planning, Estate Planning and Computerized Legal Research.

Faculty:

— Professor Thomas Lambert, Professor Alfred O'Donovan, Professor Alfred Maleson, Professor Clifford Elias, Professor Richard Vacco, Professor Anthony Sandoe and Professor Edward Bander.

March 9, 1985:
(Saturday)

— *"What Every Lawyer Should Know about the Sales Transaction: Practical Aspects of Article 2 of the U.C.C."*

Program of instruction

— includes buyer's remedies, seller's remedies, contract formation and construction, performance of sales' contracts, bankruptcy, contract impossibility.

Faculty:

— includes Dean Herbert Lemelman, Professor Richard Perlmutter, and Attorneys Jay Thiese and June Riddle.

March 30, 1985:
(Saturday)

— *Workshop on Care and Protection of Neglected and Abused Children.*

Program of instruction

— includes applicable legal standards, investigative reports, expert testimony, representing the interests of the parent and the child, dealing with agencies.

Faculty:

— Judge Paul A. Chernoff, Judge James Nixon, Attorney Adrienne Markham, Attorney William Foley, Dr. Nancy Coleman, Esq., and Professor Thomas Finn.

April 27, 1985:
(Saturday)

— *Using Demonstrative Evidence in Litigation.*

Program of instruction

— includes legal foundation for and demonstrations of such evidence as exhibits, experiments, tests, motion pictures, statistics, models, sound recordings, medical drawings, etc., with a discussion of tactics, strategy and admissibility.

Faculty:

— Judge James Lynch, Attorneys Jan Schlichtman and Gary Boland, and Professor Charles Burnim.

May 18, 1985:
(Saturday)

— *Handling the Child Support Case.*

Program of instruction

— includes an analysis of practical problems in child support cases, including enforcement mechanisms and an analysis of the impact of the 1984 federal child support legislation. This program will be co-sponsored by the American Bar Association and Suffolk University Law School.

Faculty:

— Judge Albert P. Pettoruto, Robert Horowitz, Associate Director, National Legal Resource Center for Child Advocacy & Protection, Elin Graydon, Deputy General Counsel, Department of Public Welfare, Attorney Monroe L. Inker and Professor Steven Callahan.

All programs begin at 9:00 a.m. and end at 4:30 p.m. Tuition is \$75.00 and includes lectures, program materials, coffee and lunch. For further information, please call Carol Dunn, Program Coordinator, at 723-4700 on Ext. 627.



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