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SUI JURIS

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As the graduates of Boston College Law School Class of 1968 leave these dearly loved halls after three years of intellectual stimulation the staff of Sui Juris doffs its collective hat to these estimable young men and women and joins St. Thomas More in cheerfully saying . . .

"So Long!"

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SUI JURIS

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BOSTON COLLEGE LAW SCHOOL

IN FUTURE ISSUES:

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. . . $28,000 B.C.L.S. Grant

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Pass-Fail Grading and The Absolute Importance of Subjective Evaluation

By Peter A. Donovan

The last issue of *Sui Juris* contained an article entitled *The Relative Importance of Grades* which presented a rather provocative, passionate plea in favor of a pass-fail marking system for the law school community. The traditional grading systems currently in use at Boston College and most other leading law schools were attacked as unfair specifically because they ranked students competitively within their class from top to bottom and inferentially because these gradations were considered inaccurate and hence discriminatory. The article thus raised an important issue which demands painful and exhaustive inquiry by students and faculty alike. The issue is one which must be decided by Boston College Law School before the academic year 1968-69 becomes history. With this thought in mind, I feel compelled to explore the suggestion further and, at the risk of offending many readers, to focus attention on the other side of the issue.

The nature of the article's attack on the present grading system left me somewhat confused. It presented a contrasting picture of the professional employment opportunities available to students with high class standing who often receive the highly cherished offers with those available to students at the bottom of the class who often are not even interviewed. While I can concede the accuracy and perhaps even the relevance of these facts to the issue, I have a great deal of difficulty in accepting the suggested remedy. I had always thought that virtue was its own reward and that it was nice to be right. I never thought that the man who is most often right (or, at least, right more often than his colleagues) was by this fact alone destined to be a villain and labeled with the disdainful epithet "Number One." Yet this seems the only sin Number One has committed, a sin which allegedly involves so much human turpitude that it was decreed in the prior article that he lose the fruits earned by his labor in the legal (if not the intellectual) vineyard. For this is the precise result of the proposed edict abolishing class-ranking in favor of a homogeneous pass-fail non-system of evaluating academic merit.

Why should this be so? Why should our "sinner," Number One, be denied his just recognition as a superior student and its attendant rewards in wealth and status. The answer seems to be that this is the only way in which the hero of the pass-fail attack, Mr. Van Heusen Personality, "bumping along at the bottom of [his] class," can be saved from the tender mercy of Charon ferrying him across the River Styx into Hades. While I recognize the need to rescue this "saint" from servitude under Pluto, I challenge the assertion that Van Heusen personality is saved from his ill-deserved fate by denying Number One admittance to the camaraderie of Achilles and the other heroes in the Elysian Fields.

So stated, the issue provokes the question whether there is any substance to the joinder on this emotional plateau. To this it might be answered that the challenge to the grading system was itself an emotional attack focusing largely on the unfortunate experiences of Personality as contrasted with the marketable success of Number One. Yet, the question must still be answered, whether presentation of emotional arguments on both sides of the issue can achieve any substantive understanding. This, I imagine, depends upon two further questions, namely, who is assisted by a pass-fail marking system and who is injured by it. The answers I think are relatively clear.

Certainly, Number One is hurt in the sense that he is denied his basis of distinction which is so meaningful to the "law-office ivory hunters" scattered throught the "outside world" on Main Street as well as Wall Street and State Street. These prospective "employers of young legal talent" admittedly do attribute overpowering importance to law school grades. Their reason for doing so is obvious. It is based upon the assumption (if not presumption) that the student's academic record and class standing offers a reasonable basis of objective evaluation. While the validity of the underlying premise that bluebook scores do accurately reveal a student's ability vis-a-vis his colleagues is subject to challenge, I do not believe this position is irrational. The "ivory hunters" have

simply recognized the fact that Number One and his comrades at the top of the class have achieved their position of distinction by their performance on a battery of competitive examinations graded by several professors of varying backgrounds and expectations. Because grades are the culmination of a process of this type they may, within a limited, ill-defined range of error, provide a reasonable objective standard. On this assumption, one fact is undeniably true. To the extent that these "distinguished gentlemen" (-err, sinners) at the top of their class lose professional opportunities otherwise available to them, a definite injury is produced by the pass-fail system.

But the ramifications to Number One and his associates do not end here. Suppose that he is "repulsive," or "unkempt, nervous, [and] young" (of course, he need not be; "he" could be a pretty blue-eyed blond Miss), and therefore unacceptable to most ivory hunters. Surely, he has been deprived of a countervailing weapon which could redeem his life in spite of himself. Or, worse still, suppose that he is simply not at all interested in adding greatly to Gross National Product by engaging in the high-powered practice of law, and instead wishes to continue his education. Is there any hope for this sinner (or is he now a saint since he has removed himself from the job-core ranks?) who is unhappy with his J.D. doctoral degree equivalent and wishes to pick up the prestigeous, advanced LL.M. masters degree? Will graduate schools of law admit him on the basis of his succession of "P's" or "Passes" and the form-recommendations of his professional friends? Or will they pass him over in favor of the several Number Ones graduating from other institutions?

These few examples illustrate obvious dangers to Number One and his colleagues and the risk they are asked to take under a pass-fail system. Are these risks outweighed by any advantages that system affords? This query takes us back to our now good friend, Personality.

How about him? Has he been helped? I'm not too sure he has, although supporters of the new system might contend that he will be assisted because he is not now assigned to the lowest rung on the hierarchial, academic ladder. Yet, the fact remains that he is still at the bottom of the class. The only change is that this fact is not now known to the interviewing lawyer. As a result, Personality will not be automatically excluded from an interview. But neither will he be automatically interviewed. The "ivory hunters" simply do not have the capacity or inclination to talk with everyone at all law schools on their firm's list of approved institutions. The immediate result would seem to be severe contraction of the number of acceptable institutions. If Personality's school is among those removed, clearly he is not helped. But let us assume that his school is retained and that Personality gets his chance when the interviewer comes. How will he do? Will he get the job offer? When one ponders this last question, a tremendous danger is revealed.

A pass-fail, non-ranking system will enable Personality to marshall all his charms into a blunderbuss assault which may favorably impress the interviewer and perhaps becloud the facts by consciously or unconsciously instilling or nurturing the impression that he is at the top of his class. Is anyone so naive as to refuse to believe this could occur? I hardly think so. It must be assumed a definite possibility resulting from a pass-fail system. It is perhaps unnecessary to observe that this possibility is in no way an argument in favor of a pass-fail system but, indeed, is a rather forceful reason for rejecting it. Yet, I nevertheless believe that many who want a pass-fail system would have to admit, if they were honest with themselves, that they want it for this very reason.

But only one possibility has been presented. Let us assume that Personality does not create the wrong impression and that the interviewer has correctly sized him up as being a member of the low-pass rank. Certainly, to state this is to show that again Personality is not assisted. It is only when we view the grey area where Personality has neither created the right image nor the wrong image that he is arguably benefited. His asserted benefit here, of course, springs from the interviewer's lack of knowledge of the school's internal evaluation of his academic merit. The theory is that the lack of a convenient crutch on which to lean, forces the interviewer to decide Personality's fate on his own merits.

Enticing as this argument appears, it is unsound. Is Personality being evaluated on the basis of his individual merit or is he being evaluated on the basis of the interviewer's own subjective reaction? If the interviewer is impressed with Personality, in all probability, it is because he likes him. Thus, the subjective nature of the evaluation is apparent. Surely, it is true as a general proposition that people usually are not impressed with others whom they don't like. The question then is why does the interviewer like Personality? The answer may be because he can relate to Personality due to his sex or age or the

manner in which he dresses or, worse still, because of his ethnic, social or religious background. Then too there is also the danger that Personality will lose his opportunity despite the fact that the interviewer is otherwise satisfied with him because he lacks the charisma of another of his associates.

I do not consider the possibility of fostering discriminatory hiring practices on the part of the ivory hunters as unrealistic. But perhaps the way of testing this fear (if it be not an assertion) is to ask why else will Personality be hired. I confess, I do not know. The hiring process under a pass-fail system is much too subjective for any tentative conclusions. To my way of thinking, this factor exposes a major objection to the new system. We know too little of its ramifications and nothing about its results which we are asked to institutionalize by its adoption. I, for one, am, at present, unwilling to take the step towards "who knows what." I hope many will concur in this desire for more facts and more certitude.

In contrast, the present grading system does not create this uncertainty. Its results may not always be the most desirable but they are at least palpable and for this reason the existing system is preferable to the pass-fail system. The chief objection to the class-rank grading system is that it does not always accurately reflect a student's ability and professional worth. Whether this argument is objectively sound or is simply an unproved assertion, it is truly the current vogue to attack the present system on this basis. Yet, while we would offer this criticism, I do not believe that anyone at Boston College Law School — either student or faculty — would claim that Number One and his associates at the top of the class do not deserve their position of preeminence. Rather, the attack would be predicated upon the assertion that Personality and his friends at the bottom of the class have been improperly assigned to the lowest position and unduly handicapped in their search for promising professional employment opportunities. I can concur in this last observation, but I do not think wholesale emasculation of the present grading system solves the problem.

It may come as a surprise to some, but Personality and his friends are themselves prime beneficiaries of the existing system at the Law School. This seems clearly shown by our recent placement performance. In my last year as a student (1959-60) I cannot recall a single law firm coming to the school in the search for young, legal talent. Last year, on the other hand, a large number of firms sent representatives to talk with our students, many of whom are now associated with the top firms in the nation. This tremendous change has occurred over the past eight years because the private Bar has come to recognize Boston College Law School as one of the finest in the country. Interestingly, this period of increasing recognition and acceptance of the school parallels the period of birth and growth of our *Law Review*. Our selection of Number One and his colleagues as members of "this academic House of Lords" solely on the basis of class-standing would appear imminently justified in view of the *Law Review's* accomplishments. It would also seem that the performance of these "top students" attests to their "merits" — whether subjectively or objectively determined — and the propriety of the financial and professional rewards thereby accorded them. Moreover, to the extent that the *Law Review* has itself contributed to the school's good reputation, the entire student body has received some residual benefit from the existence and use made of the present grading system. Personality himself may consider this benefit small indeed, but I think he would be the first to inform the ivory hunters that he was in the upper-half or middle of his class if the facts enabled him to do so. Quite clearly, a class ranking system assists all students who are not near the bottom of the class since it affords them a measure of differentiation which may be meaningfully translated into professional opportunity.

It is, of course, unnecessary to point out that in every multiple-party contest, there is a winner, a loser and some who finish between these two extremes. But Personality is not a loser. He has graduated from an accredited law school enjoying a fine reputation and has been certified as professionally competent. His three years of scholastic life among bright young legal minds has equipped him for a professional career. I might take a question from the previous article, turn it around, and ask whether law schools owe anything beyond that. I doubt that anyone would assert the existence of a duty to place all students, including those who are less capable than their colleagues, in the upper echelon of the legal profession, government service or the business community. The answer from Personality's viewpoint may be increasing efforts on the part of the placement office to bring to the school representatives from good law firms who do not need and do not demand only top students but who are satisfied with one whose only distinction is that he is a graduate of a respected institution. Success in this endeavor may

help Personality but it is he who is in the best position to remedy his problem. If he has the ambition, he can participate in the moot court Grimes Competition or serve on the Boston College Legal Assistance Bureau. Both are open to all students regardless of class standing and both will allow Personality to distinguish himself.

It has been suggested that a class-rank system is not necessary and is not beneficial to law schools. I disagree on both points. Quite clearly, the concept of student honorary groups — the Order of the Coif and our two publications, the *Law Review* and the *Survey,* for example — demands ranking based upon some differentiated selection. If we eliminate class-rank, what selective process will take its place? None has been offered in the pass-fail article and I am at a loss to fashion a suitable alternative. Will we be forced to select our honor students on the basis of the impression of individual faculty members? If so, are we not then substituting a more subjective standard and one which will necessarily lead to increased student lobbying? Can this result be avoided if the decision is left to the faculty? Perhaps the answer is to let the students choose from among their number those worthy of the honor. If this suggestion strikes some as ridiculous, let them recall that the pass-fail article contains some support for student initiative and responsibility in this area. With respect to the problem of staffing one of the honorary groups — the *Law Review* — the article boldly declares: "In these days of student power, the answer is easy. Let the *Law Review* decide for itself how to pick its members." Is the step from this position to the conclusion that students should choose the membership of all honorary groups one which supporters of pass-fail will hesitate to take? Does the step appear somewhat less grandiose in view of the fact that the students are now running the moot court program selecting the staff for the Legal Assistance Bureau largely on their own?

Be that as it may, I am startled by the unlimited scope of the suggested delegation of authority from the faculty to the students on the *Law Review* and *Survey*. The outgoing members could, if they chose, select incoming members solely on the basis of friendship, and there is always present the fear that friendship may become an unconscious, important factor in the decision. Again, an increase in student lobbying for honorary rewards could occur. It is suggested that this danger can be eliminated by having the two publications run a competitive research project. I find this suggestion untenable. In the first place, there are not enough editors to administer the program necessary to select thirty first-year students for the *Law Review* and twenty for the *Survey*. Secondly, first-year students do not have the time nor are they equipped to handle a massive research project during the school year. Moreover, I do not understand how the program can be administered during the vacation period. Many students must return to their homes far away from Boston and many more are not financially able to devote their summer to *Law Review* and *Survey* competition. And this is true of both the editors and the researchers. Yet the lead time required for fall editions requires selection of members and assignment of publication projects early in July.

The mechanics of the situation are such that the competition can be administered only if a small portion of the first year student body participates. Should this occur the entire project could result in a colossal failure. Some of the best sudents may be excluded from the publication staffs. A decline in the quality of the student work would harm the School's reputation and hence Personality and his associates as well. In light of this contingency can it still be argued that the class-rank system does not benefit the school? Obviously not. The school must have its publications in the hands of its most capable students and they can be selected only on the basis of the competitive performance of the entire student body. It seems, therefore, that law schools need a rank system just as much as the legal profession, though for a different reason. Using bluebook scores as the sole factor may not be the best criteria both because of the subjective nature of essay grading and the possibility of a student not performing at his best during the examination period but it is certainly a most essential, if not the most essential, factor.

Finally, the suggestion of a competitive research program seems itself to ignore the desired homogeneity of a pure pass-fail system and to perpetuate the existence of the structure which has caused Personality and his associates so much grief. By whatever process *Law Review* and *Survey* membership is determined, their very existence will insure at least a three-tier system. The ivory hunters will continue to recognize the existence of a separate elite group within the "pass" rank and will continue to interview them on a first priority basis. In schools like Boston College which have two student publications a fourth rank will be established whenever the students, faculty or outside observers consider one of higher quality. Instead of having categories, A through C or D, we would have the ranks "high pass," "pass" and "fail" with the possibility of further refinement of the high-pass rank into "high-pass, publication X," and "high-pass, publication Y." The only change is elimination of "pluses" and "minuses" within the existing letter categories. Removal of these subcategories may be desirable since it would contract markedly the number of gradations from ten to five and the quality point ratio spread between the top and the bottom but it would not eliminate the necessity for drawing fine distinctions. I wonder whether the faculty, or even the students, will find it easier to separate the "high-pass" from the "pass" than the B+ from the A− or the C+ from B−. Yet, these fine distinctions must still be drawn.

In the final analysis, it seems clear that a true pass-fail system cannot exist at the law school level as long as the schools continue to elect students to such honorary groups as the Order of the Coif and to publish law journals written and edited by students. It is only in the unlikely event that they discontinue these practices that a true pass-fail system can be incorporated into the law school community. I therefore feel it is unrealistic to discuss the possibility of all law schools deciding tomorrow to grade students on a pass-fail basis. In any event, however, I would strongly object to a movement in this direction not only because I feel recognition of scholastic achievement and student publication necessary elements to the educational process but also because I fear a pass-fail sustem would seriously lessen — perhaps even destroy — student motivation. Too many students have voiced to me the feeling that they most probably would spend less time and energy in the study of law under the new system. It appears to me that today's students have little in common with Mr. Justice Story who, in an earlier period of the American tradition, once found that law was "a jealous mistress" which "requires a long and continued courtship," a love "not to be won by trifling favors, but by lavish homage."

If I am correct in my feeling that a pure pass-fail system will not and should not be incorporated into the law school community, I need not long dwell on how the legal profession might improvise to equip itself with the factual knowledge of a student's competitive merit which the schools would deny them under a nation-wide pure pass-fail system. Yet, there are some points which must be made if only to complete the counter-argument. It has been suggested that the ivory hunters might utilize an existing institution, the Bar Examination. This would require them to postpone their hiring practices until after the results of the examinations are fully tabulated. But which examination or examinations? Would the firm use the examination of its home state? Is this a reasonable alternative when the firm is largely engaged in federal law practice? Would it be wise for the firm automatically to exclude all students who cannot satisfy the residency requirements of its state? Would the firm use the earliest examinations on a geographic basis or would it select those which it believes are the best in selected geographic regions? Which are they? What regions are appropriate? Would a Wall Street firm accept the grading and ranking of lawyers in another state whom they do not know and who serve on that state's Board of Bar Examiners? I do not consider these questions meaningless. Rather, I think they point to the unlikelihood of law firms using the Bar Examinations to satisfy their desire for knowledge of a student's academic merit. It seems they would be more apt to call upon some institution like the Educational Testing Service to administer a competitive examination throughout the country. But is this a likely possibility? I confess, I do not know, but I would point out that I am aware of no cooperative effort among law schools to devise common examinations. Can law firms agree where the law schools have shown no inclination toward joint development in this important area? Perhaps they can, but I would hope they would decline to do so. The result on legal education would be stifling if they did. Law school curricula would become relatively basic and quite rigid since no school could afford the undesired distinction of having produced a large number of mediocre graduates. Too many schools would gear their energies toward the national test and this would result in sharp curtailment of innovation in legal education. Much of the progress achieved in these days of student power to shape legal education to the demands of a modern society would be lost. If only to avoid this happenstance, let us carefully consider the demerits of pass-fail and the merits of diffractive grading as well as the "merits" of the former and the evils of the latter.

Again, let me reiterate. Number One and his associates at the top of the class are not the only beneficiaries of the ranking system. Personality and his colleagues have also gleaned well at the harvest in the

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LEGAL AID TO THE POOR — AN ALTERNATIVE!

By James Connolly

The Need for Free Legal Services

Judge Learned Hand said: "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice." It is no secret that, in the United States, justice has been rationed among those who could afford it. Undeniably, meaningful recourse to the law requires the services of a lawyer. As a result, those without the financial means to retain the services of a lawyer have been effectively denied their right to equal protection under the law.

The great need for providing legal assistance to the poor has never been more evident than it is today. The following facts indicate the extent of this need:

1. Approximately 20% of our population are "poor" — that is, they are without income sufficient for their unquestionable daily needs. (It should be noted that many of those in this category are not poor enough to qualify for free legal assistance under most legal aid programs. These people are what is known as the marginally indigent.)

2. Six to ten persons per thousand of our population each year are in need of legal advice or assistance and are unable to pay fees.

3. In Boston, as an example of a large urban poverty area, poverty (25% of the families earn less than $3,000 per year; in Roxbury, there are 1100 families that earn less than $1,000 per year) and lack of education (83% of those over twenty-one have not completed high school; 19,000 adults have never attended school) have led to the situation that exists in our courts. On an annual average, 6,000 supplementary process matters and 8,000 small claims matters are presented to the Boston courts. These cases concern, primarily, domestic relations, landlord-tenant, and money matters. Startlingly, approximately 70% of these matters are adjudicated without the benefit of the defendant's counsel and, most of these without even the defendant.

Perhaps more obvious than the need itself is the fact that this need has not been met. This was explained by Columbia Law School Professor Elliot Cheathem by considering the legal profession in industrial terminology, in terms of production and distribution: "The product of the bar is certainly superior but distribution is quite inadequate. While stressing improvement of quality, the bar has neglected revision and expansion of methods by which legal aid may be extended to all in need." Now, especially with the impetus of the Office of Economic Opportunity in the past two years, plans and programs have been devised to bring the law to the poor. It is now understood that the poor have little respect for, or confidence in, the law, and often for good reason. Their contact with the law and "justice" has been limited to arrests and evictions. It is now understood that the poor are generally not aware that legal services are available free of cost and that even when they are aware they are ill-disposed to venture far beyond their own neighborhood. R. Sargent Shriver, the Director of C.E.O., explained why the poor want and need free legal aid:

> The poor cannot afford even the smallest misfortune. And the law can sometimes avert disaster. The poor are weak. And the law is a source of strength. The poor are insecure. And legal rights are a source of security. But most basically, the poor want legal services because now they are treated as second-class citizens. And legal representation is both a symbol and a guarantee of first-class citizenship.

The development of legal aid programs

Initially, once the need was recognized, free legal services were provided only by private practitioners who devoted a portion of their time to the legal problems of the poor. Gradually, charitable groups and bar associations devised schemes by which such services could be made available. In some cases, an attorney on the staff of a local bar association would be assigned the duty of acting as the poor man's counsel. Usually, this was merely a secondary duty. In other cases, an attorney would be assigned to pay regular visits to a public office to do what he could to provide legal assistance.

Because the need was so great, especially in large urban areas, it became apparent that legal services had to be made available on a full-time basis. Thus, the legal aid office came into being. An excellent example of such an office is the Boston Legal Aid Society, a charitable organization founded in 1900 whose purpose was, and still is, to provide free legal aid to all those who could not afford to retain a private attorney. The Society maintains a staff of lawyers in a downtown office. In the sixty-eight years of its operations, it has accomplished a great deal, providing free legal services to many who would not otherwise have recourse to the law to resolve their difficulties. The meritorious work of this society and others like it should never be underrated. Such organizations have filled a great void in their early recognition of the need for such services and in their acting to make these services available.

Yet a great deal more had to be done. The centrally located legal aid offices were not able to meet the enormous need. Such programs had two big strikes against them. First, they were not well publicized and virtually unknown to those who required free legal help. Second, many of the poor were unwilling or afraid to venture far beyond their own neighborhood.

To overcome these deficiencies the legal aid office was moved into the poverty area. By its very presence and by some local publicity, it would become known to the people as the place where free legal assistance was available. Because it was located in the neighborhood, there would be less fear in seeking such assistance.

Relocation of the legal aid office in the poverty area seemed to provide the ultimate solution. Now, a greater number of those who require but cannot afford legal services can be assisted. Furthermore, it is expected that as the poor become more aware of the availability of legal aid and of what can be accomplished through legal processes, the image of the law and the lawyer is bound to improve.

The legal aid office is certainly in an effective state but it cannot be denied that many difficulties remain. Every legal aid office must have an intake procedure — an unfortunately necessary process of questioning an applicant to determine whether he is eligible for free legal assistance. Such preliminary questioning concerns not only his "financial status but also his legal problem because there are subject-matter limitations, i.e., certain legal matters for which the office may not provide assistance, such as probate, contingent fee, income tax, patent and copyright matters. Such questioning, especially when done in the legal aid office, does little to foster a desirable lawyer-client relationship. Yet, as embarrassing as this procedure is, it is often aggravated by inquiries into an individual's personal and family status. This step is taken in an attempt to treat the applicant's "total problem" and refer him to various welfare agencies when it is deemed appropriate.

When an applicant has a legal problem which the legal aid office is not permitted to handle or when the applicant is not "poor enough" to meet financial eligibility standards, another form of referral is made. In such cases, the applicant is referred to a bar association or a lawyer referral service which directs the individual to a private attorney. Yet, unless the ineligible client has a fee generating case or can make full payment of the desired fee in advance, it is unlikely that the private attorney will accept his case. Even knowing of an unsuccessful referral, the legal aid attorney is unable to help because of the strict eligibility limitations.

Of those cases accepted by the legal aid office, approximately eighty percent are in recurring categories. This presents another difficulty which was expressed during the 1965 National Conference on Law and Poverty. There it was pointed out that as we provide legal aid and concern ourselves with the problem that confront the unfortunate and deprived classes, we must be careful to avoid creating a "freak" who would be neither a good lawyer nor a competent social worker. With such a high incidence of recurring poverty-type cases being presented to the legal aid attorney, there exists some danger of mass production which would result in the disappearance of the high professional standards required of the attorney and the office. This danger is increased by an O.E.O. requirement that attorneys in programs funded by the O.E.O. refrain from engaging in private practice of any sort. Although legal aid attorneys generally devote full time to their legal aid duties most of them do carry on a private practice, however small it may be. Completely proscribing private practice will not create a better legal aid attorney. By taking a lawyer out of the mainstream of legal thinking, it could only encourage the creation of that "freak."

Finally, the greatest drawback of present legal aid programs is their failure to effectively utilize the services of the private community lawyer. It is un-

likely that a legal aid office located in an urban poverty area can meet the enormous need for free legal services. If the poor are to have adequate legal representation, the formation of a strong local bar in the poverty area must be encouraged. Every day law students and lawyers are reminded of their obligation to serve the poor. But moral inducement is not enough. Financial inducement is necessary.

The legal aid office concept has its shortcomings; it is not a panacea. Nevertheless, it has been generally considered the only acceptable method of providing free legal services to the poor. This inclination toward uniformity is not indicative of a desire to devise the most effective system of legal aid. In 1965, the American Bar Association adopted a resolution "to improve existing methods and to develop more effective methods for meeting the public need for adequate legal services." This provision is not kept by concentrating on a single method of providing legal aid. As Professor Marvin E. Frankel of Columbia Law School said, limiting legal aid to one form "amounts to a declaration of war, not on poverty, but on competition."

There is an alternative!

Judicare

In 1950, England adopted a national legal aid program which was unique in that it used private, non organizational lawyers to represent the poor, with the government paying the fees. The significance of such a plan was that it allowed the poor to select and retain counsel of their choice. Thus, the same form of legal services available to paying clients was made available to those who could not afford to pay. Furthermore, lawyers were now willing to accept the poor-man's case and to work with the poor since adequate compensation would be provided for their efforts. England's national legal aid plan proved quite successful.

Despite the resolve of the American Bar "to develop more effective methods for meeting the public need for adequate legal services," the suggestion that the English plan be tested was not too favorably received. It was felt that legal aid to the poor could become most effective if we stuck with one basic concept, i.e., the legal aid office, and tried to perfect it. Somehow, notwithstanding the unfavorable response to the English plan, a token attempt was made.

On June 1, 1966, the newest and most controversial legal aid program in the United States — "Judicare" — was initiated in Wisconsin by a grant of $241,000 from the O.E.O. It was patterned after the English plan in many respects. It is best described by analogy with Medicare. Judicare is the legal counterpart of Medicare, except that instead of using an age test to determine eligibility, Judicare uses a means test.

The system operates quite simply. Qualification for free legal services is indicated by the Judicare card. For any individual to obtain a Judicare card, he applies at a local welfare office and may get his card whether or not he has an immediate legal problem. If he meets the means test ($2,080 income for an individual $4,160 for a family of four, and has no real property over $5,000 or personal property over $2,500) he is issued a card. The holder of such a card may consult the lawyer of his choice whenever he is in need of legal advice or assistance. The lawyer may charge the welfare agency a fee of $5 for the initial visit. For his additional services he is paid at a rate of 80% of the State's minimum fee schedule, but with a maximum of $300 per case and $3,000 annually unless these maxima are waived by the Judicare Board. There are also various subject matter limitations, i.e., no legal service may be provided for probate work, contingent fee matters, criminal matters, income tax matters, or for patent and copyright work.

There is an advisory board whose purpose is to resolve difficulties and establish policy. It consists of representatives of local welfare and social aid agencies, local bar presidents, and representatives of the poor (as required by O.E.O.). The board meets regularly. Its function is to keep it in contact with the poor and with the participating attorneys, but it does not, in any way, impinge on the individual lawyer's professional duties and responsibilities.

Administration is handled by a central office with a small staff consisting of a director, a counsel, an auditor, two stenographers and some part time law students. Administrative costs are reportedly quite low (estimated at 30% of the per case cost as contrasted with England's 60% per case figure). This is due in part to the absence of red tape and paper work. The procedure is simple with only five pieces of paper involved: (1) the application form, (2) the Judicare card, (3) the initial conference report submitted by the attorney, (4) the final bill and (5) the check. Of these forms, the lawyer must expend time on only the third and fourth and only the final bill would take up more than five minutes of his time. The President of the Wisconsin Bar, Mr. Philip S. Habermann, feels that his administration staff could easily take on a greatly increased workload without a marked increase in the size of his staff.

(1) *Eligibility*

Judicare's method for determining financial eligibility has the outstanding feature of keeping the eligibility factor outside of the lawyer's office. Since all questioning is done by a separate agency, the client, armed with his Judicare card, can meet and deal with his attorney on the same basis as that of a fee-paying client. This system not only avoids embarrassment but saves the lawyer time as well. A more desirable lawyer-client relationship is inevitable.

Under a legal aid office program, there is a continuing danger that the legal aid office will compete with the local attorney. To avoid such competition, financial eligibility standards must be properly gauged. If the standards are set too low, many will be deprived of a right to free legal assistance and still be unable to obtain it by themselves. If they are set too high, the local attorneys will be deprived of clients. There is no danger of competition under the Judicare plan because the local lawyers would have the sole responsibility for providing legal services.

Judicare is, however, at the same disadvantage as any other legal aid plan since it is unable to serve the legal needs of the marginally indigent, i.e., those who cannot afford to retain a private attorney and yet do not qualify for free legal assistance.

The reason for this inability is, of course, due to a lack of funds. If funds were to become available, the Judicare plan could easily be extended to provide for the marginally indigent. This could be accomplished by greatly enlarging the financial standard to allow the marginally indigent to obtain needed legal assistance. England has such a system: anyone is eligible to receive free legal services but while some have to pay nothing others have to pay a little and still others pay a high proportion of the legal fees. The various degrees of indigency are determined by the welfare agency. Again, since private lawyers are providing all the legal work for the poor, there is no competition problem. The lawyers are protected, the bar remains independent, and all in need receive legal assistance.

(2) *Freedom of Choice*

Judicare's most distinctive feature is that the client may choose his own attorney. Because of this freedom of choice and because eligibility is determined outside the lawyer's office, a close lawyer-client relationship is attained.

Much controversy has arisen over the importance of allowing a client to choose his own lawyer. Judicare proponents claim that when a person of insufficient means is able to retain the same attorney as the more affluent members of his community, regardless of whether or not he does so, he is assured of equal justice under the law. They further assert that the image of the law is improved when an individual is aware that equal treatment is available.

The importance of freedom in lawyer selection has been disputed by the claim that the poor generally don't know where to find a local lawyer. Mr. Robert Spangenberg, Consultant to the O.E.O.'s Legal Services Program, reported that in New Haven, Connecticut, only 16% of the persons he interviewed knew of a local lawyer. Whether this fact is true only in poverty areas is not certain. Nor is it certain that a legal aid office would be any more widely known than a lawyer's private office. Perhaps, the reason that few people know of local lawyers is because local lawyers are few in the poverty areas. And the reason for this, at least in part, is because private practice in these areas has been effectively discouraged under present legal aid programs. The Director of Wisconsin's Judicare, Joseph F. Preloznik, argues that even if the poor do not personally know of a local lawyer and even if their selection process amounted to picking a name out of the Yellow Pages, "is it *not* our duty through community education to teach the poor to exercise their rights, rather than assume their ignorance and restrict their choice?"

(3) *Can private attorneys be as effective as the legal aid office?*

Opponents of the Judicare method say that it is not the right to choose one's own attorney that is important but rather that one has a competent attorney available to represent and advise him. There is some truth to this point. However, the tacit assumption of such a statement is that a private attorney is not competent, or not as competent as a full time legal aid attorney in handling the cases of poor clients. Such a generalization is obviously improper. The legal aid lawyer does become somewhat of an expert in handling the recurring poverty-type cases that beset him. And if he can avoid the danger of treating these cases mechanically, he is likely to do an effective service. Any lawyer who specializes to any de-

gree develops some semblence of expertise in his work. But in no instance can one conclude that mere repetition is any assurance of excellence. The quality of performance depends not on the quantity of experience but on the concern and effort expended in any case.

The private attorney who carries on a general practice in any community is presented with a wide variety of cases and problems. Although this attorney may handle just a handful of debt liquidation cases or just one relief eligibility case each year, he is never assumed to be rendering less than adequate service to his clients. Given the same lawyer and similar circumstances, prior experience would allow for a somewhat improved performance by virtue of the ease in handling a case. This experience is available in legal aid offices. It is also available in private practice by working with the poor and their problems as they arise.

The legal aid office does serve a vital function in poor communities; and, because of current opinion and force of habit, these offices will continue to be the main source of free legal assistance in those communities. However, before real progress can be made through the relationship of the poor with the legal community, the local private lawyer will have to be more involved in providing the needed legal aid. Lack of financial independence is the greatest deterrent to such involvement. Mr. Spangenburg's studies have shown that about 90% of local lawyers in poverty areas are pleased with the presence of legal aid offices and that these lawyers refer a great number of poor clients to these offices. But, is this because the legal aid office can do more to improve the image of the law or because better service is provided by the legal aid lawyer or because private lawyers cannot do an effective job with the cases presented them? No! The reason for these referrals is because the local lawyers cannot afford to spend, in some cases, one third of their time with non-paying cases even though they feel strongly obliged to do so. Being able to refer such clients to legal aid offices allows the lawyer to concentrate on his fee-paying clients. It can hardly be said that a lawyer in a poverty area is unfamiliar with the problems of the poor. In more cases than not, this lawyer would be more familiar with such difficulties than any specially trained attorney. Nor can it be said there is a great diversity between the problems which a local attorney handles on a fee-paying or partial fee-paying basis and those that he refers to the legal aid office when the client cannot pay a fee. Yet, if there were such a diversity, it could only be avoided by remunerating local attorneys for handling these non-paying clients. Then, the private attorney would truly become involved.

Mr. Spangenburg is a strong supporter of the legal aid office system but he feels that the involvement of local private attorneys is necessary and that there must eventually be a "combination system," using private attorneys along with the legal aid offices. He considers it essential that the young neighborhood lawyers should be induced into, rather than deterred from, taking part in serving the poor of the community. At the same time, Mr. Spangenburg feels that the Judicare is not effective or efficient in accomplishing its purpose, that it is being backed solely by lawyers and not the poor community or poverty experts, and that, of these lawyers, about 99% are pushing Judicare for economic reasons, i.e., to profit by serving the poor. If this estimate is accurate, it may be considered an unfortunate reflection of the obligation which the legal profession shares. Then, again, it may not be so unusual when we consider the fact that legal aid is not only the bar's problem; the burden of providing equal justice is upon all citizens. As Professor Frankel puts it: the farmers don't supply milk to the poor for free; why treat the lawyer differently?

(4) *Cost of Judicare*

The strongest objection to Judicare is that such a program is too expensive to operate. According to Mr. Spangenburg, the average cost per case under Judicare is $140 compared with the full time legal aid lawyer's cost of $35. (This is considering the fact that the Judicare fee is computed at 80% of the minimum fee schedule in Wisconsin.) According to William D. Marsh of the O.E.O.'s Legal Services Program and an opponent to the Judicare plan, the cost of running such an operation would definitely be excessive unless the case load in an area is too small to occupy a lawyer's full time or unless compensation is paid at less than the "fair rate."

When one is confronted with a new system that costs four times more to operate than the present system, it is only natural to expect dismay even before an adequate examination is made of that new system. This high price tag should not be cause for junking Judicare but it should be cause for re-examination. It should be kept in mind that Judicare is young and has had few customers. In the 26 county area of Wisconsin where the pilot program has been conducted, there were but 326 lawyers and during its first year of operation it reached only one tenth of the people it had expected (cases per 1,000 population: Judicare, 0.8; national average, 7.0). It is normal for the administrative cost per case figure to decline as the quantity of work increases and to decline still more as the system becomes more understood. The lawyer's cost can be expected to fall off as his experience in handling more poverty matters increases and his time spent per case becomes less.

Because costs are so high in the rural area of Wisconsin, it is assumed by many that in an urban community they will skyrocket to ten times the cost of operating legal aid offices. Whether there is any possibility of this occurring cannot be certain unless and until some programs of privately retained counsel can be conducted in a large urban poverty community. Yet, if excessive cost is a necessary feature of Judicare or any similar plan, it is not enough, of itself, to allow such a plan to be ignored.

When the demands for free medical assistance were being made a variety of plans were proposed. The American Medical Association insisted that the practice of medicine should not be socialized. Ultimately, Medicare came into being and was accepted by the medical profession, applauded by the public, and in no way considered socialized medicine but rather the long overdue fulfillment of society's and the medical profession's obligation to care for the poor and the elderly. Immense cost had to be borne but this was tacitly accepted by the public. The American Medical Association was satisfied because the doctors would not lose any patients and the highly essential doctor-patient relationship would be maintained. Medicare and the newer Medicaid programs consume millions upon millions of tax dollars each year, properly justified as being necessary for the public welfare. Why is such a clamor made about the high cost of providing free legal aid to the poor so that they can receive assistance on the same basis as the more affluent? We are under no constitutional requirement to provide medical aid for all but we are so bound to provide equal justice for all. And, in my opinion, if there is anything that can eliminate those factors that perpetuate poverty, it is the law. No price tag should be placed on equal justice.

CONCLUSION

Judicare may not be a panacea. It does, however, provide some distinct advantages over any other legal aid scheme. It is a more flexible system, encouraging private practice among the poor and thereby allowing legal aid to grow with the community, the profession, and the American society. It is a more fair system, enabling the poor to select their own legal representatives and compensating the attorneys for their efforts on behalf of the poor. It is a more realistic system, most closely approximating the form of legal services available to all Americans.

It is often said by legal aid experts that the touchstones of any legal aid program must be to foster respect for the law while retaining the traditional independence of the bar. No other legal aid program meets these criteria as well as Judicare.

It is my feeling that eventually our system of providing legal aid will operate on the premise of the poor choosing their own attorney. Such a plan doesn't force any attorney to accept an undesirable client nor force a client to accept an undesired attorney. It will allow all lawyers to become involved in providing legal aid to those in need rather than limiting such vital service opportunities to a few. The greater participation by the legal profession will result in a greater awareness of the poor's legal needs and, in turn, will make the poor aware of the help available to them through the law. Mutual respect and understanding is inevitable.

If there is a duty to all those deprived of legal protection, should it not be shared by all members of the legal profession? We may never have a system which gives every indigent the best legal aid every time. But that is not our obligation. We are bound to one end; not special justice for the poor, but equal justice for all.

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The Legality of the Vietnam War

By Francis J. Nicholson, S.J.

As is obvious, the Vietnam war presents legal, moral, and political problems of extraordinary complexity. This short essay will limit itself to the problem of legality.

Central to any consideration of the role of the United States in Vietnam is the question of the legality of the war this country is waging there. And the law which tests legality in this case is primarily international law. Does the position of the United States in Vietnam violate international law?

A brief historical summary is in order for orientation purposes. Vietnam, together with Cambodia and Laos, became French protectorates in the period from 1885-1893. These territories formed the colony which came to be known as French Indo-China.

During World War II French Indo-China came under Japanese control. Ho Chi Minh and his Viet Minh fought the Japanese on the side of the United States and her allies. French forces returned to Vietnam in 1945, but their attempt to resume control met opposition from the national feelings of the Vietnamese for independence, and, particularly, from Ho Chi Minh's "war of liberation." The defeat of the French at Dien Bien Phu in 1954 set the stage for the present crisis.

During the 1946-1954 war between Ho Chi Minh and the French, it became clear that Ho and his forces were Communist. To the North the Chinese Communists were in the process of defeating Chiang Kai-Shek's Nationalists, and the People's Republic of China was proclaimed in 1949. Then came the Korean War in 1950. Understandably, there was some concern in Washington about this Communist activity.

On June 27, 1950, President Truman issued a statement in which he outlined the United States Government's response to the attack by the invading forces from North Korea. In that statement, in which the President ordered United States forces to give the Korean Government troops cover and support, we find the following directive:

> "I have similarly directed acceleration in the furnishing of military assistance to the forces of France and the Associated States in Indochina and the dispatch of a military mission to provide close working relations with those forces."

It is clear, therefore, that long before Dien Bien Phu and the Geneva Accords of 1954, the United States Government had its disapproving eye upon Ho Chi Minh and his forces. The United States policy in Asia, since the end of World War II, has been one of containment of Communism — in 1950 it was in Korea; today it is in Vietnam; tomorrow it may be in Thailand. This policy of containment is still operative in Washington, as Secretary Rusk made clear recently in his testimony before the Senate Foreign Relations Committee.

I. *The United States and South Vietnam have the right under international law to participate in the collective defense of South Vietnam against armed attack.*

South Vietnam is an independent state. It has been recognized by approximately 60 governments the world over. It has been admitted as a member of a number of the specialized agencies of the United Nations.

South Vietnam, therefore, has the right to defend itself and to request help from other nations in its fight against armed attack.

Has there been aggression against South Vietnam? This has to be established, of course, before the response of the South can be characterized as self-defense and, therefore, legal.

Aggression has more than one definition. The classic form of aggression is the armed attack across a territorial frontier — e.g., Germany's crossing the Polish frontier in September, 1939, to attack that country and to start World War II. But the last 25 years have seen other forms of aggression like subversion, infiltration, etc., which can be just as effective as a massive attack across a political border.

During the five years following the Geneva Conference of 1954, the Hanoi regime developed a covert political-military organization in South Vietnam based on Communists cadres it had ordered to stay in the South, contrary to the provisions of the Geneva Accords. The activities of this organization were directed towards assassination of civilian officials, acts of terrorism, etc.

From 1959 to 1964, North Vietnam moved over 40,000 armed and unarmed guerrillas into the South. In 1965, Hanoi began to infiltrate elements of the regular North Vietnamese army into the South. It would seem, therefore, that by any definition South Vietnam could legally characterize Hanoi's activities as aggression.

International law has traditionally recognized the right of self-defense against armed attack. The principle of self-defense, today, is universally recognized and accepted.

The United Nations Charter, although it generally proscribes the use of force in international affairs, explicitly reserves the inherent right of self-defense against armed attack, in Article 51:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. . . ."

II. *The Geneva Accords of 1954 and the actions by South Vietnam and the United States.*

The Geneva Accords of 1954 established a cease-fire in Vietnam, drew a provisional demarcation line with a demilitarized zone on both sides, and required Ho Chi Minh's forces to withdraw north of the 17th parallel, and the French armies to withdraw south of that line.

Furthermore, the introduction of new troops and military equipment into Vietnam was prohibited (Arts. 16 & 17), the establishment of new military bases was forbidden (Art. 18), and provision was made for the unification of the two zones in Vietnam "as a result of free general elections by secret ballot . . . to be held in July, 1956, under the supervision of an international commission." (Para. 7, Final Declaration).

Obviously, these fundamental provisions of the Geneva Accords have not been complied with. Is it possible, therefore, to brand United States activity in Vietnam as illegal, because of a violation of these treaty provisions?

It should be noted, first, that neither South Vietnam nor the United States signed the Geneva Accords. Therefore, under international law, neither country, as a non-signatory, is bound by its terms.

This technical argument aside, however, there are other considerations with respect to this treaty which, arguably, would sustain the legality of the United States position in Vietnam.

From the very beginning, the North Vietnamese violated the 1954 Geneva Accords. Communist military forces and supplies were left in the South in violation of the Accords. Other Communist guerrillas were moved north for further training and then were infiltrated into the South in violation of the Accords. Under international law the violation of a treaty by one of the parties renders it voidable as to the other parties. The United States and South Vietnam could, therefore, hold that the Geneva Accords were no longer binding on them, even if we assume that they were bound in some way by the 1954 agreement.

It can be also argued that, legally, South Vietnam was justified in refusing to implement the election provisions of the Geneva Accords. There are grounds for holding that conditions in North Vietnam during the 1955-1956 period were such as to make it impossible to hold "the free general elections by secret ballot" provided for in the treaty. The Communist leaders in the North were running a police state so that the result of the voting, had it been held, would have been perfectly predictable. With a substantial majority of the Vietnamese people living north of the 17th parallel, such an election would have meant turning the country over to the Communists without regard for the will of the people. South Vietnam could have properly concluded that elections in 1956, as contemplated by the Accords, would have been a useless formality.

The United States did not sign the Geneva Accords but it made a unilateral declaration of its position in these matters at the final session at Geneva, July 21, 1954, through Under Secretary of State Walter B. Smith.

> "The Government of the United States . . . would view any renewal of the aggression in violation of the aforesaid agreements with grave

concern and as seriously threatening international peace and security.

"In connection with the statement in the declaration concerning free elections in Vietnam my Government wishes to make clear its position which it has expressed . . . as follows:

'In the case of nations now divided against their will, we shall continue to seek to achieve unity through free elections supervised by the United Nations to insure that they are conducted fairly.'"

It can be concluded that the United States position in Vietnam today is compatible with this declaration and that, with respect to the Geneva Accords, it has not violated its duty under international law.

III. *The United States' International obligation to defend South Vietnam in the SEATO treaty.*

Later in 1954, the United States negotiated with a number of other countries and signed the Southeast Asia Collective Defense Treaty. The treaty contains in the first paragraph of Article IV the following provision:

"Each Party recognizes that aggression by means of armed attack in the treaty area against any of the Parties or against any State or territory which the Parties by unanimous agreement may hereafter designate, would endanger its own peace and safety, and agrees that it will in that event act to meet the common danger in accordance with its constitutional processes. Measures taken under this paragraph shall be immediately reported to the Security Council of the United Nations."

Annexed to the treaty was a protocol stating that:

"The Parties to the SEATO Treaty unanimously designate for the purpose of Article IV of the Treaty the State of Cambodia and Laos and the free territory under the jurisdiction of the State of Vietnam."

The Senate gave its advice and consent to the treaty by a vote of 82 to 1.

The treaty was intended to deter armed aggression in Southeast Asia. The treaty was intended to give the assurance of United States assistance to any party or protocol State that might suffer a Communist armed attack, regardless of the views or actions of other parties.

It should be recalled that one of the most basic rules of international law is: *Pacta sunt servanda.* It can therefore be concluded that the United States' presence in Vietnam, in response to its commitment in the SEATO Treaty, is in fulfillment of its duty under international law.

IV. *The President has full authority to commit United States forces in the collective defense of South Vietnam.*

The points thus far considered are probably the most substantial ones involved in considering the legality of the United States position in Vietnam. There are several other questions being debated which relate in some way or other to the President's power in the conduct of the war. These can be noted briefly.

1. Does the President's power under the Constitution extend to the action currently undertaken in Vietnam?

Under the Constitution (Art. II) the President, in addition to being Chief Executive, is Commander-in-Chief of the Army and Navy. He holds the prime responsibility for the conduct of the United States foreign relations. These duties carry very broad powers, including the power to deploy American forces abroad and to commit them to military operations when the President deems such action necessary to maintain the security and defense of the United States.

Since the Constitution was adopted there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior congressional authorization — e.g., President Truman ordered troops to Korea during the Korean War of the early 1950's.

2. The Joint Resolution of Congress of August 10, 1964, authorizes United States participation in the collective defense of South Vietnam.

In addition to the power of the President, the Congress has acted to approve and authorize United States actions in Vietnam — the Gulf of Tonkin resolution adopted by a Senate vote of 88-2 and a House vote of 416-0.

Section 1 resolved that "Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression." This authorization extended to those measures the President might consider necessary to ward off further attacks and to prevent further aggression by North Vietnam in Southeast Asia. The joint resolution then went on to provide in Section 2:

"The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in Southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the SEATO Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the SEATO Treaty, requesting assistance in defense of its freedom."

The August, 1964 joint resolution continues in force today. Neither the President nor the Congress has terminated the joint resolution.

3. Is a declaration of war necessary?

No declaration of war by the Congress is needed to authorize American actions in Vietnam. Over a long period in our history, practice and precedent have confirmed the constitutional authority to engage United States forces in hostilities without a declaration of war.

This paper passes no judgment on the political wisdom of the American involvement in Vietnam. Nor does it address itself to the moral issues which the war presents. And in this consideration from the viewpoint of international law, the author cheerfully admits that there are weaknesses in the United States Government's position, and that international lawyers are to be found on both sides of the argument. But in the view of this international lawyer the answer to the question, Does the position of the United States in Vietnam violate international law?, has to be, No.

Mr. Murphy is professor of law at Duquesne University. Ed.

SBA REPORT

Lawrence W. Schonbrun
President
Student Bar Association

The Student Bar Association is going to take on the rather ambitious program of research into all facets of student life here at the law school.

It should be pointed out, however, that any progress which we may make next year hinges on the direct participation by the student body at large in the projects which its elected officers undertake.

It is my hope that the newly elected Board will carry on and expand the work begun under President E. J. Holland in the area of giving students a consultative role in the determination of law school policies and procedures. This year, for the first time, students were allowed formal representation on fac-

ulty committees (curriculum, library and re-admissions). The faculty decision to allow students to have fully elective course schedules after the first year was, I feel, testimony to the constructive role which students can serve in presenting responsible suggestions on school policy.

In addition to this consultative role, however, students have a right to know the reasons *why* decisions are made by the faculty. At the present time there is no way by which students can find out the specific reasons that were voiced by the faculty when a particular request is made to them (i.e. refusal to grant J.D. degree and refusal to hold Academic Day of Conscience). I hope that during my tenure in office, student representatives together with the faculty can work at a procedure whereby the student body will be directly informed concerning why particular decisions were made.

Along with these questions of communication between faculty and students, there are substantive issues which the SBA hopes to correct.

The major project for next year is expected to be a complete review of the grading system. The institution of the new elective system and articles in *Sui Juris* [Vol. 11, No. 3 and Vol. 12, No. 2 respectively] by the Law Review and Mr. Zobel in regard to grades re-inforce the necessity for examination of the role which grades are supposed to play in our education here at the law school.

Other areas in which we hope to concern ourselves are:

(1) Changes in the library brought to light by the Library Committee Questionnaire.

(2) Admissions procedure and the awarding of scholarships.

(3) The relationship between the University and the law school as regards finances.

(4) Ways in which the Placement Office can better benefit a cross section of the student body.

Finally, it is hoped that the SBA can begin to determine how the law school should best involve itself in the affairs of the community. With the help of the student A.B.A. perhaps we can redefine the role of the law student and his responsibility to the society in general. Whether this will take the form of more Law Days or allowing students "real" experience in the outside world during third year, remains to be seen.

Pass-Fail Grading (Continued from page 7)

law school vineyard. It seems clear to me that pass-fail is not the answer to Personality's problem. We can continue the present grading system with the modification of establishing rank-lists only to the point necessary for internal law school purposes. As an alternative we could rank only the upper half of the class. Either of these arrangements would avoid the danger of assigning Personality to the lowest class-standing and would still protect those who have successfully engaged in the trial of combat. But complete abolition of class-ranking is unduly injurious to the top students who have *earned* their position of preeminence and seems a remedy worse than the disease.

The Purpose of Grades: A Reply to Professor Zobel

By Cornelius F. Murphy, Jr.

I have read with great interest the article on the "Relative Importance of Grades" by Professor Zobel which appeared in the April issue of *Sui Juris*. Taking up his invitation to discuss the topic, I would like to submit the following reflections.

I.

One difficulty which I have with Professor Zobel's analysis concerns the assumptions he makes about the purpose of grading. His criticism is built upon the implied hypothesis that the principle justification for grading is its usefulness to law firms and other prospective employers interested in hiring law graduates. While it is true that one function of grading is to assist these prospective employers, to treat that function as the overriding or essential purpose of a grading system is to miss the basic reason for the existence of grades within a law school.

Grading is grounded in the integrity of the teaching process; its roots lie in the intellectual encounter between teacher and student. It is an attempt to measure the extent to which the student has grasped the conceptual substance of a given course. It is an imperfect effort because no measuring device can fully fathom how deeply the spirit of a subject has permeated the inner resources of a person's mind and soul. Yet the judgment is not arbitrary. There is a relative development, a progress either ample or marginal, of which grades can be an index. Indeed, experience shows that nuances of grading can reveal how well the student has responded to the stimulus of learning.

In grading, a teacher is involved in the very heart of the learning process. In giving a mark, he is trying to express, as best he can, the fruits of a mutual effort towards understanding the nature of law in the specific area of discourse. And in so doing he does not act as an agent for any outside employer. Nor does he minister to student pride. He is trying to probe the growth of intelligence.

II.

Seen in this perspective, grading serves purposes considerably more significant than those assigned by Professor Zobel. Yet a heightened significance should not blind us to the abuses which he has so skillfully articulated. In particular, his objections relative to the use of grades in hiring deserves some extended comment.

In drawing a contrast between "Personality" who, although likable, fails to get the better jobs and "Number One" who is often hired even though he is a bore, Professor Zobel has, I believe, oversimplified the relationship between academic performance and professional competence. Any prospective employer whose duties normally involve complex legal work — an appellate court, labor union, government agency — as well as the "State Street firm"; must, to be responsible, try to hire students whose educational experience suggests that they have the intellectual ability to handle difficult legal problems. For these employers, a pure book worm can be a liability, but personality alone just won't do. Some firms or agencies may have an exaggerated view of the importance of their day to day work, but in essential outline, the desire for grades does have a more weighty motivation than Professor Zobel is willing to concede.

To the extent that there is abuse, there are administrative techniques available as a corrective. For example, a school may choose to reveal only that a student is within a certain group without designating his specific position in the classification. As far as unfortunate consequences of grading within a school are concerned, comparable reforms can be adopted.

To correct the deficiencies in the way in which grades are used is surely a desirable objective. But to eliminate grading, or to reduce it to a minimal pass or fail, would be a serious mistake. For its existence is intimately bound up with the ends of legal education and the confrontation of teacher and student which that education involves. That it is essential to these purposes is proven by the fact that no more compelling reason for the continuance of grades can be mustered other than to argue that teaching, of itself, demands it.

STUDENT FACULTY

While many universities throughout the world were encountering student unrest and its disruptive influence on the academic scene, the Boston College Law School Faculty was endeavoring to develop a dialogue between the student, faculty and the administration. Since the most logical area for student-faculty interchange of philosophies was the law school curriculum, two students were appointed to represent the student body on the Faculty Curriculum Committee. The students were Walter F. Kelly, Jr., a member of the National Moot Court championship team as the representative of the class of 1968 and James M. O'Connor, representative of the class of 1969.

Mr. Kelly and the author met with the faculty committee comprised of Professors James Smith, chairman, James Houghteling, Sanford Fox, David Carroll and Arthur Berney. These meetings developed into a serious exchange of what the philosophy of a law school should be and how best to fulfill this role through its curriculum. After many, sometimes heated, sessions both faculty and students admitted that they had achieved a deeper understanding of the problems facing the Law School.

A unanimous Faculty Committee on Curriculum submitted to a meeting of the full faculty in April a proposal which would present the student with more of an opportunity to design his law school curriculum in relation to his prospective specialty. The full faculty extending this proposal voted to make the entire second and third year courses elective. The student representatives felt this was a manifestation of the

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Thomas Jones '73

By Prof. James W. Smith

Thomas Jones '73, a recent graduate of the Utopia School of Law, is being interviewed by the hiring partner of the firm of Deeds, Easements and Mortgages.

The interview proceeds in somewhat the following manner:

Partner: "Come in, Doctor Jones, I hope we haven't kept you waiting too long."

Doctor Jones: "Oh, not at all — as a matter of fact, I just arrived."

Partner: "Good, have a seat Doctor."

Doctor Jones: "Thank you. Incidentally I would be much happier if you just called me Tom."

Partner: "Sure Tommy, I can well imagine how you feel. I suppose however that being called 'Doctor' does have its rewards."

Tommy: "Except for the fact that my drugstore now gives me a 20% discount, the whole thing has been a nightmare. People call me up at midnight wanting advice on everything from excessive dandruff to hangnails. Now the Internal Revenue Service is investigating my reported earnings for last summer.

Partner: "That's too bad! Maybe there is some way that the faculty at Utopia can go back to the LL.B. or come up with some other kind of degree and have it apply retroactively. Incidentally, how did the students at Utopia finally get the faculty to buy the JJ.D. after all those years of frustration?

Tommy: "We almost got it the year that we refused to take the field in the annual student-faculty lacrosse game. Many of the faculty had been practicing for weeks and had brought their wives and kids to the game. They held a special meeting in the locker room and by a very close vote decided against the JJ.D. The next year we finally came up with the necessary leverage — we threatened to start attending classes."

Partner: "That must really have put the faculty in a bind."

Tommy: "Well, some of them did start to worry about whether this would affect their writing programs. However, it was really the administration that cracked. When the students stopped going to class five years ago the administration was able to come up with a wide variety of rich elective courses. Since giving a course merely involved reading a few papers at the end of the year, some of the profs were offering as many as five or six courses. For example, the Future Interests prof gives seminars called 'The Fee Tail in a Modern World' — 'Jee v. Audley Revisited,' — 'Perpetuities in a Nutshell' — 'The Plight of the Unborn Widow' and a practical skills course 'How to Dock the Entail.' If the students started to attend classes the administration would would either have to drop these rich electives or hire a faculty to teach them."

Partner: "I wish we had tried something like that when I was there — who knows where I would be today with the JJ.D. or some other important degree. Well, Tom, let's get down to business. I notice from your resumé that you have a keen interest in Commercial Law. I take it that you find the Code to be quite a challenge."

Tom: "Which code?"

Partner: "Come Tom, your putting me on — the Commercial Code, of course."

Tom: "Oh, that one — well, actually it's not quite what I had in mind. You see, I wrote a paper in connection with my course, 'The Law Looks at Itself' which was an in depth study of the feasibility of abolishing the caveat emptor doctrine in Bolivia as a step in the right direction toward eliminating the horrible substandard conditions which exist in that country."

Partner: "Sounds interesting. Unfortunately this office does not have an international law practice — real estate is our forte. Do you have any feeling for in depth studies of covenants running with the land?"

Tom: "Running with who — I mean whom?"

Partner: "Never mind, perhaps we can use your talents in some other field — how's your your softball?" (Here partner laughs — alone).

Tom: (Tom does not respond).

Partner: "I have letters from the three faculty members whose names you submitted for recommendations. None of them remember you by face but Professor Brown, who claims that he presides over a course called: 'The Law Looks at Itself' recalls receiving a receiving a paper from you dealing with Caveat Emptor in Peru."

Tom: "I think it was Bolivia."

Partner: "Well, he says Peru. In any event he indicated that he recalls distinctly that the paper showed a great deal of promise. By the way, what was your grade in the course, 'The Law Looks at Itself?"

Tom: "Peter Fox."

Partner: "What?"

Tom: "A passing fail. It means that while your work in the course was unsatisfactory, it was not so unsatisfactory as to overcome the presumption of legal ability which was created by being admitted to Utopia."

Partner: "Does anyone ever get an unpassing fail?"

Tom: "Oh certainly! A friend of mine who spent most of the academic year studying art in France received three unpassing fails. This really split the faculty. They finally voted to deny him a JJ.D. unless he promised to spend the summer reading 'The Bramble Bush', which, of course, he refused to do. Imagine!"

Partner: "Tom, some of the older partners in this firm feel that in selecting our young lawyers we should not be guided solely by appearance and personality — that perhaps the student activities of the candidate should be considered. Did you perhaps hold any offices as a student — did you participate in any extra-curricular activities?"

Tom: "Oh certainly. For two years I was chairman of the Annual Faculty-Student Lacrosse Game. Also I headed up a group called 'The Committee to Abolish Attractive Nuisances' or C.A.A.N. for short."

Partner: "What's that?"

Tom: "Well, for years lawyers, judges and profs have been spouting off about attractive nuisances. All talk and no action. It's not enough to give a bag of money to some kid who has been injured by an attractive nuisance. Our group went out into the highways and byways seeking out attractive nuisances. When we found one we would picket the owner's house until he abated the nuisance — everything from turntables to unfenced golf courses had to go."

Partner: "Tom, that is truly the law in action. It should really impress my fuddy duddy partners."

Tom: "Thank you."

Partner: "Tom, I called the registrar of the law school to inquire about your record there. He indicated that you did indeed attend Utopia and that you did indeed receive the JJ.D. All of your grades, except in four courses, were passing and your four fails were passing fails — in short, a near perfect record. Not once did the faculty manage to overcome the presumption of legal excellence. For all anyone knows, you may well have been first in your class. Congratulations! You may start with us next Monday.

Tom: "Gosh, my first real job — it is certainly a thrill."

Partner: "Your mother should also be quite happy — by the way, will you tell her to hold dinner — I have a late closing."

Tom: "Sure thing, dad. Incidentally, I sure wish you would stop calling me 'Doc' in front of my friends. They are beginning to think you are serious.

A VIEW FROM THE MIDDLE

Hi, you-all up there in that great legal Nirvana in the stratosphere. Bless you, SBA. Greetings, Annual Survey. Shalom, Law Review. I represent the amorphous middle, or, to phrase it in more precise mathematical terms, you may find me at the highest point on the bell curve of any grading chart. I was once in the top half of my class; but, due to the standards of excellence required from such fantastic mentors as the Slew, Sunshine Superman, and Harry, I experienced a worse slump than the Baltimore Orioles of 1967. Did I panic? Of course I did. But, this recession had its worthwhile moments. For example, I first became aware of administrative law when I asked Dean McCarthy what the procedure was for petitioning for readmission at the end of second-year. Fortunately, I did not have to face the Inquisition. For just as *ultra vires* and I.R.C.S1245 were about to expunge me of my student's status in that cold winter of '66-'67, St. Francis, the Patron Saint of 2-S deferments, appeared with Roget's Thesaurus firmly grasped in hand to rescue me from the Right-wingers. I finished my second year ninety-fifth (3.76453243) down twenty-seven points (excuse me, places). Little did I realize then that if I had studied more diligently and had managed to have accumulated a 3.76453244, I still would have been in the top half of the class instead of the bottom quarter of the middle third (the classification used for job interview purposes).

So, with second year written off as a sophomore slump-identity crisis syndrome, I approached third-year quite confidently prepared to rely on this Senior Estoppel theory I had once heard being bantered around the Law School Food Fair. Well, folks, this Estoppel theorum is all very well and good, as long as one becomes aware of a very important corollary; namely — Do Not Take Estate Planning. I took Estate Planning and my plan violated the Rule against Perpetuities. Need I say more? Anyhow, while my fellow commoners were reaping the fruits of a more sagely conducted course schedule with grade quotients approaching that dizzying 6.0, my fruit was rotting. At the All-Star break I was still at 3.76453243.

However, as 1968 arrived and I realized that I would never be on Law Review, I stopped worrying about grades. Well, to be absolutely honest, it was not this Law Review shootdown that effected this change of values; it was the result of several job interviews. Certain interviewers explained that since I was in fairly good health, single, and most importantly under twenty-six, chances were very good that if hired I would not be available until sometime in 1971 and they wanted someone NOW. So there you have it. I was not hired, but not because of my grades; I was the victim of a status non-crime. Then I began to feel that passing the Bar would mean an inspection of my Browning Automatic Rifle and who would really care whether one held an LL.B. cum 3.0 or a J.D. cum 6.0. Finally, I completely rationalized a lower-middle class status by relying on the fact that my father is an attorney and the only qualifications he desires from his sibling is a beating heart and an intent to be a witness at weddings (he is also a J.P. — small town, you know).

But, am I unhappy? Of course not. In this last glorious year, I distinguished myself. I have adverse possession of the third table down in the cafeteria. I have become very proficient at crossword puzzles. I received a letter opener for being a member of the Blackstone Law Club. I am also somewhat of an iconoclast: I write "I like H.B.Z." on walls; and I have also supported Marcellino and Spencer in all elections. Finally, I have one scintilla of advice for all B.B's (Budding Barristers)who masochistically desire to matriculate at Boston College. Join the G.O.P. (Genuflect or Perish.) Pax Vobiscum, and good night.

Student Faculty (Cont. from page 19)

faculty's confidence in the student body's maturity. The faculty also kept the Law School within the vanguard of progressive law schools who have vested students with academic self-determination.

The faculty's vote, however, has in no means terminated the work of the Student-Faculty Curriculum Committee. The student and faculty members of the committee are working jointly throughout the summer to compile complete information on Bar requirements throughout the country. In addition, a program with faculty advisors in the different specialty areas of the law will be established to aid the students in choosing valuable career related courses.

The student body of Boston College Law School has a difficult mantle to bear, but the pitfalls of narrow course load and unrelated courses which confront them can be easily overcome due to the working cooperation with the faculty established by the Student-Faculty Curriculum Committee.

From
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